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Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

Emil and Gabriela Botezatu,

Petitioners,

v.

Immigration and Naturalization Service, et. al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Congress, in passing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, intend to leave litigants without any judicial forum in which to pursue constitutional claims against the Immigration and Naturalization Service, even if those claims do not challenge the merits of any decisions made by the INS, but only the procedures used in making those decisions, and even if they do not involve challenges to the three discrete decisions protected by the language of the statute?

2. If Congress did so intend, does it have the constitutional power to strip the federal courts of jurisdiction over constitutional claims where no alternative federal forum is available?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Brian Perryman, the Chicago District Director of the Immigration and Naturalization Service, was a party to the case before the Court of Appeals.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities vi

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions 2

Statement of the Case 3

A. Factual Background 4

B. Proceedings Below 7

C. Basis for Federal Jurisdiction in the First Instance 8

Reasons for Granting the Writ 8

I. The Seventh Circuit's Determination that the "Exclusive Jurisdiction"

Provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Precludes Judicial Review of Habeas Corpus Petitions Alleging Due Process Violations Conflicts with the Great Majority of Federal Circuit Courts of Appeals 9

A. The Seventh Circuit's Decision Con- Conflicts with Other Courts of Appeals by Failing to Distinguish Between Challenges to the Merits of INS Decisions and Challenges to the Constitutionality of the Procedures Used in Reaching Those Decisions..... 14

B. The Seventh Circuit's Decision Conflicts with Other Courts of Appeals by Giving §1252(g) a Broader Interpretation than Justified by its Language or this Court's Decision in *AADC* 17

II. The Seventh Circuit's Decision Improperly and Unnecessarily Raises the Serious Constitutional Question Concerning the Scope of Congress's Power to Strip the Federal Courts of Jurisdiction Over Constitutional Claims..... 22

III. This Case Raises Recurring, Important Issues that This Court Should Resolve 26

Conclusion 28

Appendix

A. Initial decision of Seventh Circuit denying appeal, Botezatu v. INS, 195 F.3d 311 (CA7 1999) 29

B. Decision denying rehearing, Botezatu v. INS, No. 98-4155 (CA7, Jan. 5, 2000) 36

C. Decision of District Court, Botezatu v. INS, case no. 98cv01965 (NDIL, Oct. 21, 1998)(Lindberg, J.) 38

D. Complaint 41

E. INS decision of June 7, 1997, denying reinstatement of voluntary departure 61

F. INS decision of February 5, 1998, denying humanitarian parole 64

G. INS decision of March 11, 1998, denying a stay of deportation 66

TABLE OF AUTHORITIES

Page

Cases

Barahona-Gomez v. Reno,
167 F.3d 1228 (CA9 1999) 10, 14

Bhatt v. Reno,
--- F.3d --- (CA7 1999)
(1999 U.S. App. LEXIS 26545)..... 27 n1

Botezatu v. INS,
195 F.3d 311 (CA7 1999) 9, 17

Bowen v. Michigan Academy of Family Physicians,
476 U.S. 667 (1986)..... 22, 23, 25

DeSousa v. Reno,
190 F.3d 175 (CA3 1999) 10 n1, 17, 21

Fedorca v. Perryman,
197 F.3d 236 (CA7 1999) 27 n1

Felker v. Turpin,
518 U.S. 651 (1996) 24 n2

Garcia-Guzman v. Reno,
65 F. Supp. 2d 1077 (N.D. Cal. 1999) 10n1, 15 n4, 18 n6

Johnson v. Robinson,
415 U.S. 361 (1974) 23

Jurado-Gutierrez v. Greene,
--- F.3d --- (CA10 1999)
(1999 U.S. App. LEXIS 30711) 10 n2, 20 n7

Mayers v. Reno,
175 F.3d 1289 (CA11 1999) 10 n2, 20 n7

McNary v. Haitian Refugee Center, Inc.,
498 U.S. 479 (1991) 12, 22

Mustata v. U.S. Dep't of Justice,
179 F.3d 1017 (CA6 1999) 10 n2, 16, 18 n6

Musto v. Perryman,
193 F.3d 888 (CA7 1999) 27 n1

Reno v. American-Arab
Anti-Discrimination Committee,
525 U.S. 471 (1999) ..... *passim*

Requena-Rodriguez v. Reno,
190 F.3d 299 (CA5 1999) 10 n2, 20 n7

Richardson v. Reno,
180 F.3d 1311 (CA11 1999), *rehearing en*
banc denied, 193 F.3d 525 (CA11 1999) 10 n2, 20 n7

Selgeka v. Carroll,
184 F.3d 337 (CA4 1999) 10 n2, 15,
20 n7

Shah v. Reno,
184 F.3d 719 (CA8 1999) 10 n2, 20

Stewart v. INS,
181 F.3d 587 (CA4 1999) 10 n2, 18 n6

Tefel v. Reno,
180 F.3d 1286 (CA11 1999), *rehearing en*
banc denied, 198 F.3d 265 (CA11 1999) 10 n2, 15 n4

Wallace v. Reno,
194 F.3d 279 (CA1 1999) 10 n2, 20 n7

Walters v. Reno,
145 F.3d 1032 (CA9 1998),
cert. denied, 526 U.S. 1003 (1999) 10 n2, 12, 14 n3

Webster v. Doe,
486 U.S. 592 (1988) 23, 25

Zhislin v. Reno,
195 F.3d 810 (CA6 1999) 10 n2, 17, 19

Statutes

Illegal Immigration Reform and
Immigrant Responsibility Act of 1996,
8 U.S.C. §1252(g) ..... *passim*

Other Authorities

Erwin Chemerinsky, Federal
Jurisdiction (3d ed. 1999) 22 n1

PETITION FOR WRIT OF CERTIORARI

Petitioners, Emil Botezatu and his wife Gabriela Botezatu (collectively "Petitioners"), respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 195 F.3d 311 (CA7 1999) (App. A). The decision denying rehearing en banc, *Botezatu v. INS*, No. 98-4155 (7th Cir., Jan. 5, 2000) is unpublished and included in the appendix herein (App. B). The opinion of the district court in *Botezatu v. INS*, case no. 98cv01965 (N.D. IL., Oct. 21, 1998) (Lindberg, J.) is not published, but is included in the appendix herein (App. C).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 21, 1999. The Court of Appeals denied a timely petition for rehearing on January 5, 2000.

The jurisdiction of this Court is invoked under 28

U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, §9 of the United States Constitution provides in relevant part:
"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public safety may require it."

28 U.S.C. §2241(a) provides in relevant part:
"Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."

28 U.S.C. §1331 provides that "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States."

Section 242(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. §1252(g), provides: "Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the

decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act."

STATEMENT OF THE CASE

The fundamental question in this case is whether, in passing the immigration statute codified at 8 U.S.C. §1252(g), which covers decisions by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien, Congress intended to foreclose judicial review of procedural due process and other constitutional claims brought against the Immigration and Naturalization Service ("INS").

In this case, Petitioners, a married couple, applied for post-deportation relief and were denied such relief without a hearing. They alleged that this and other procedural irregularities violated their rights to procedural due process. Mrs. Botezatu, a Romanian national, has been granted political asylum in the United States by the INS, meaning that she has a well-founded fear of persecution should she return to Romania. She is now a permanent resident of the United States, and she has applied for citizenship. The INS seeks to deport Mr. Botezatu, who has no criminal record at all, poses no danger to the community, and is a productive member of society, because he overstayed his tourist visa while claiming asylum. Petitioners sought post-deportation

relief so that they could stay together in this country, which was especially critical for them given Mrs. Botezatu's inability to return to Romania. To fully appreciate the significance of the issues presented by this case, it is essential to consider its factual background and the specific claims made by Petitioners.

A. Factual Background

Petitioners Emil and Gabriela Botezatu were born in Romania. They first met in 1988 and soon started living together. Petitioners have lived together continuously for nearly twelve years.

Petitioners experienced political problems in Romania after they participated in demonstrations against Nicolae Ceausescu and his successor Ion Iliescu, and in 1993 they sought asylum in the United States. On March 19, 1993, they filed separate, nearly identical, applications for political asylum. (They were mistakenly advised by the person who assisted them with their asylum applications that they should not get married prior to seeking asylum.) Mrs. Botezatu was granted asylum. Mr. Botezatu's asylum application was denied by an immigration judge, and he appealed that decision to the Board of Immigration Appeals ("BIA"). During this appeal, Petitioners were legally married, and Mrs. Botezatu, by then a lawful permanent resident of the United States, applied for permanent

residence for Mr. Botezatu. This application was *approved*, but there were no visa numbers available for Mr. Botezatu to immigrate. (App. D ¶¶ 9-16.)

The BIA denied Mr. Botezatu's asylum claim, and he appealed that decision to the Seventh Circuit in 1996. On April 7, 1997, the Seventh Circuit dismissed Mr. Botezatu's asylum appeal. Thereafter, the INS issued a "bag and baggage" letter demanding that Mr. Botezatu report for deportation to Romania.

Petitioners sought to remain in the United States together. Accordingly, they sought several post-deportation remedies. First, on May 1, 1997, Petitioners filed for reinstatement of Mr. Botezatu's voluntary departure so that he could leave the United States without the stigma of deportation and later re-enter the country to be with Mrs. Botezatu when his visa number allowed him to immigrate.[1] The reinstatement application was denied on June 6, 1997 (App. E). Petitioners' Complaint in this case alleges that the Chicago District Office of the INS uses its power to rule on applications for extensions and reinstatements of voluntary departure as a means of discouraging asylum applicants from pursuing appeals, penalizing those who do choose to appeal to the Seventh Circuit because they are viewed as "su[ing] the INS".

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[1]One who is deported -- even if married to a United States citizen -- must normally wait ten years before re-entering this country. *See* 8 U.S.C. §1182(a)(9)(A)(ii).

After reinstatement of voluntary departure was denied, Petitioners' attorney called a deportation officer to discuss other possible remedies so as to enable Mr. Botezatu to continue living with Mrs. Botezatu or to rejoin her as soon as a visa number became available for him. Before any substantive conversation could take place, the officer, admitting he was thoroughly unfamiliar with the case, stated that any request for a stay of deportation would be denied out of hand, and that he was under a directive to deny all stay requests unless they involved serious medical reasons. Moreover, the officer requested that counsel not file a stay application simply because this would require him to respond in writing, requiring extra work. Petitioners' Complaint in this case alleges that within the past two or three years, the Chicago District office of the INS has adopted a policy of "front-desking" stay applications, automatically denying requests for stays of deportation without giving them any consideration whatsoever unless they are based on serious medical reasons. Family unity factors, though traditionally considered important, are no longer given any consideration (App. D ¶¶ 23-25).

On July 9, 1997, Petitioners filed an application for humanitarian parole, or alternatively for deferred action, which was subsequently denied (App. F). They then applied for a stay of deportation. On March 11, 1998, the INS denied the application for a stay of deportation (App. G). The INS decided all of the foregoing applications for post-

deportation relief without a hearing.

B. Proceedings Below

On March 31, 1998, Petitioners filed the instant complaint in federal district court, alleging, *inter alia*, that the methods the INS used in denying their various applications violated procedural due process in that: (1) the decisions were made by a non-attorney who did not conduct any hearing at all despite the important rights involved; (2) the INS pre-judged the merits of their applications, and of others seeking similar relief, before they were even submitted; and (3) the INS gave directives to its officers that eliminated family unity considerations as a factor in deciding which people can remain in this country despite a deportation order (App. D).

Petitioners also alleged substantive due process violations, i.e, that Respondents' failure to allow this married couple, who have lived together for almost twelve years, to stay together is a violation of their rights of marital privacy. Additionally, they alleged various violations of treaties to which the United States is a signatory, as well as violations of customary international law, which protect the right of marriage. Finally, Petitioners alleged that the INS has engaged in a pattern of misusing the voluntary departure remedy to dissuade asylum seekers from exercising their right to appeal.

The INS moved to dismiss the case, and the District Court granted its motion, holding that it had no jurisdiction over the foregoing claims (App. C). The case was then appealed to the Seventh Circuit, which affirmed (App. A). A timely Petition for Rehearing En Banc was denied on January 5, 2000 (App. B).

C. Basis for Federal Jurisdiction in First Instance

Petitioners contend that there is no evidence that, in passing 8 U.S.C. §1252(g), Congress intended to foreclose jurisdiction over constitutional claims, specifically the claims of widespread procedural irregularities alleged in their complaint. Therefore, since §1252(g) does not apply to such claims, the federal courts have jurisdiction over this case under 28 U.S.C. §2241 (the habeas statute), 28 U.S.C. §1331, and the Suspension Clause of the Constitution (Art. I, §9).

REASONS FOR GRANTING THE PETITION

Certiorari should be granted in this case for three reasons. *First*, the decision below conflicts with the law in the great majority of circuits on the important issue of the extent to which federal courts still have jurisdiction to entertain habeas petitions raising constitutional claims in

light of Congress' recent immigration reforms. *Second*, the Seventh Circuit's decision effectively -- and unnecessarily -- raises the serious constitutional question whether Congress has the power to strip federal courts of their jurisdiction over constitutional issues. *Third*, this Court's review would provide much-needed clarity on recurring issues of fundamental importance to immigration law.

I. THE SEVENTH CIRCUIT'S DETERMINATION THAT THE "EXCLUSIVE JURISDICTION" PROVISION OF THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996 PRECLUDES JUDICIAL REVIEW OF HABEAS CORPUS PETITIONS ALLEGING DUE PROCESS VIOLATIONS CONFLICTS WITH THE GREAT MAJORITY OF FEDERAL CIRCUIT COURTS OF APPEALS.

In the decision below, the Seventh Circuit held that Petitioners' procedural due process claims were subject to the jurisdiction-stripping provisions of §242(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-546 ("IIRIRA"), codified as 8 U.S.C. §1252(g) (Supp. 1998) ("§1252(g)"), because they amounted to a direct challenge to the merits of a deportation order and thereby impermissibly intruded on the Attorney General's "'no deferred action' decisions and similar discretionary determinations." *Botezatu v. INS*, 195 F.3d 311, 313-14 (CA7 1999) (quoting *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 485 (1999)

("*AADC*")) (App. A). This holding directly conflicts with the decisions of nine other Courts of Appeals.[2]

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[2]*See Wallace v. Reno*, 194 F.3d 279, 285 (CA1 1999) (noting that "[t]he Supreme Court's surprisingly narrow reading of [§1252(g)] . . . certainly does not encourage us to enlarge the reach of that section" and concluding that the federal courts may entertain habeas petitions challenging the constitutionality of final orders of deportation); *DeSousa v. Reno*, 190 F.3d 175, 182-83 (CA3 1999) (holding that §1252(g) "only applies to suits challenging the government's selective enforcement of the immigration laws"); *Selgeka v. Carroll*, 184 F.3d 337, 341 (CA4 1999) (concluding that §1252(g) did not apply to a due process claim challenging the refusal to permit petitioner to present his application to an immigration judge in a deportation hearing); *Stewart v. INS*, 181 F.3d 587, 594 (CA4 1999) (ruling that habeas jurisdiction was available there because "a motion to reopen is very similar to a motion to reconsider" and *AADC* specifically excluded motions to reconsider from §1252(g)'s scope); *Requena-Rodriguez v. Reno*, 190 F.3d 299, 303 (CA5 1999) (holding that district courts have jurisdiction to hear habeas petitions that challenge a final order of deportation because such a challenge does not fall under one of the three discrete actions listed in §1252(g)); *Zhislin v. Reno*, 195 F.3d 810, 813 (CA6 1999) (concluding that due process claims are subject to judicial review if they arise from deportation proceedings so long as they do not directly challenge the three discrete events listed in §1252(g)); *Mustata v. U.S. Dep't of Justice*, 179 F.3d 1017, 1023 (CA6 1999) (ruling that §1252(g) did not strip the district court of jurisdiction over the petitioners' habeas claim that ineffective assistance of counsel at their deportation hearings violated due process); *Shah v. Reno*, 184 F.3d 719, 722 (CA8 1999) (noting that "[t]he words 'commence proceedings, adjudicate cases, or execute removal orders' refer to separate and discrete actions in the deportation process" and, consequently, §1252(g) "has nothing to do" with cases where

These other circuit courts, when faced with substantially identical issues, have held that in light of this

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"review is sought of a final order of deportation"); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234 (CA9 1999) (holding that §1252(g) does not preclude jurisdiction over due process claims); *Walters v. Reno*, 145 F.3d 1032, 1052 (CA9 1998), *cert. denied*, 526 U.S. 1003 (1999) (ruling that the federal courts had jurisdiction over due process claims challenging the adequacy of the notice a class of aliens received concerning their possible deportation for document fraud); *Jurado-Gutierrez v. Greene*, --- F.3d --- (CA10 1999) (1999 U.S. App. LEXIS 30711, at *13) (holding that a final order of deportation remains reviewable on habeas because it does "not interfere with the Attorney General's decision to commence proceedings, adjudicate cases, or execute a removal order"); *Richardson v. Reno*, 180 F.3d 1311, 1312 (CA11 1999), *rehearing en banc denied*, 193 F.3d 525 (CA11 1999) (holding that a habeas petition challenging the constitutionality of petitioners' removal from the United States or their detention while awaiting removal is not barred by §1252(g)); *Tefel v. Reno*, 180 F.3d 1286, 1298 (CA11 1999), *rehearing en banc denied*, 198 F.3d 265 (CA11 1999) (concluding that "constitutional challenges to legislation specifically mandating [a certain] application of the stop-time rule" are not barred by §1252(g)); *Mayers v. Reno*, 175 F.3d 1289, 1297 (CA11 1999) (holding that final orders of deportation are reviewable because §1252(g) excludes from judicial review only three discrete decisions or actions of the Attorney General). *See also Garcia-Guzman v. Reno*, 65 F. Supp. 2d 1077, 1083 (N.D. Cal. 1999) (concluding that petitioner's claim was cognizable on habeas because he "is not claiming that the INS should have granted him 'deferred action' before adjudicating his case -- instead he challenges the statutory and constitutional foundation for other decisions made during his removal proceedings").

Court's narrow interpretation of §1252(g) in *AADC*, procedural due process claims remain subject to judicial review on habeas corpus as "'general collateral challenges to unconstitutional practices and policies used by'" the INS. *Walters v. Reno*, 145 F.3d 1032, 1052 (CA9 1998), *cert. denied*, 526 U.S. 1003 (1999) (quoting *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 492 (1991)). The conflict between the rule applied by the Seventh Circuit and the rule applied by these other circuits is apparent from a brief comparison of the cases as viewed against the backdrop of the rule that emerges from *AADC*. Indeed, while this Court's opinion in *AADC* did not decide whether §1252(g) precludes judicial review of habeas claims, it noted that "[t]here is disagreement on this point in the Courts of Appeals." 525 U.S. at 480 n.7. Unfortunately, the Courts of Appeals remain divided on this question.

In *AADC*, this Court gave §1252(g) a "narrow reading," refusing to interpret it as covering the spectrum of deportation orders. *Id.* at 487. In fact, the Court expressly rejected the notion that §1252(g) "covers the universe of deportation claims -- that it is a sort of a 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review.'" *Id.* at 482. Rather the Court indicated that §1252(g) is "much narrower" and applies only to "three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases or *execute* removal orders.'" *Id.* (quoting §1252(g)). The Court buttressed this

interpretation by relying on the apparent rationale underlying §1252(g). Specifically, the Court reasoned that Congress enacted this provision to "give some measure of protection to 'no deferred action' decisions and similar discretionary determinations." *Id.* at 485. In other words, the Court concluded that §1252(g) was enacted to prevent the federal courts from interfering with the Attorney General's prosecutorial discretion.

As applied by the nine circuit courts that conflict with the Seventh Circuit, §1252(g), as interpreted in *AADC*, would *not* preclude jurisdiction over Petitioners' claims that Mr. Botezatu was denied due process. These courts have been primarily guided by the logic of two interrelated principles that now stand diametrically opposed to the Seventh Circuit's position. First, they have held that habeas review remains available in cases where petitioners are not challenging the *substance* of the INS's decisions but rather the constitutionality of the *procedures* used in reaching those decisions. Second, the majority of Courts of Appeals have interpreted *AADC* as construing §1252(g) narrowly so as to preclude only direct challenges to the Attorney General's discretion to *commence* proceedings, *adjudicate* cases, or *execute* removal orders. Simply put, §1252(g) protects only the Attorney General's discretion to *prosecute*.

A. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH OTHER COURTS OF APPEALS BY FAILING TO DISTINGUISH BETWEEN CHALLENGES TO THE MERITS OF INS DECISIONS AND CHALLENGES TO THE CONSTITUTIONALITY OF THE PROCEDURES USED IN REACHING THOSE DECISIONS.

In contrast to the court below, most Courts of Appeals have recognized that habeas review remains available in immigration cases where, in the words of the Ninth Circuit, the petitioners' objective is "not to obtain judicial review of the merits of their INS proceedings, but rather to enforce their constitutional rights to due process *in the context of* those proceedings."[3] Thus, the great majority of the Courts of Appeals have held that while §1252(g) clearly precludes challenges to the outcome of the Attorney General's decision to prosecute (for example, a claim that the Attorney General or INS should have granted a petitioner some form of deferred action), it does not strip the federal courts of jurisdiction to hear habeas petitions challenging the process by which the decision was made (for example, a

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[3] *Walters v. Reno*, 145 F.3d 1032, 1052 (CA9 1998), *cert. denied*, 526 U.S. 1003 (1999) (emphasis added) (holding that the federal courts had jurisdiction over due process claims challenging the adequacy of the notice a class of aliens received concerning their possible deportation for document fraud). *See also Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234 (CA9 1999) (quoting this language from *Walters* in holding that, by its terms, §1252(g) does not preclude jurisdiction over due process claims).

claim that the Attorney General or INS based the decision to prosecute a petitioner's deportation on his or her race).

In the instant case, the Botezatus' procedural due process claims are *not* attacks on the merits of the Attorney General's decision to deport or claims that the INS should have granted Mr. Botezatu "deferred action." Rather, they are challenges to the constitutionality of the procedures used in reaching decisions made after his deportation proceedings ended. Indeed, in a similar political asylum case where the petitioner challenged only the adequacy of INS procedures, the Fourth Circuit concluded that habeas review is available under §1252(g) where a petitioner seeks the minimum protections of due process and is improper where the prayer is to reverse a denial of deferred action. *See Selgeka v. Carroll*, 184 F.3d 337, 342 (CA4 1999). Likewise, the Eleventh Circuit has held that the federal courts have jurisdiction in cases where petitioners challenge the *manner* in which discretionary actions or decisions are rendered as opposed to the *outcome* of those decisions.[4]

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[4]*See Tefel v. Reno*, 180 F.3d 1286, 1298 (CA11 1999), *rehearing en banc denied*, 198 F.3d 265 (CA11 1999) ("Plaintiffs' challenges . . . involve constitutional challenges to legislation specifically mandating [a certain] application of the stop-time rule. Plaintiffs' claims do not challenge the Attorney General's exercise of her discretion to commence proceedings, adjudicate cases, or execute removal orders."). *See also Garcia-Guzman v. Reno*, 65 F. Supp. 2d 1077, 1083 (N.D. Cal. 1999) (concluding that petitioner's claim was cognizable on habeas because he "is not claiming that the INS should have granted him 'deferred action' before adjudicating his case -- instead he challenges the

Here, the Botezatus are claiming that the INS violated their procedural due process rights. More specifically, their claim is that the INS's failure to provide a fair and adequate process for considering requests for humanitarian parole, voluntary departure, and stays of deportation resulted in a violation of due process. Thus, because Petitioners' procedural due process claims are not challenging the outcome of any INS decisions, but rather the procedures used in reaching them, they should be subject to federal habeas jurisdiction.

In accepting this line of reasoning in a similar case, the Sixth Circuit recognized that the "fact that the [petitioners] . . . seek a stay of deportation does not make their claim one against the decision to execute a removal order." *Mustata v. U.S. Dep't of Justice*, 179 F.3d 1017, 1023 (CA6 1999) (holding that §1252(g) did not strip the district court of jurisdiction over the petitioners' habeas claim that ineffective assistance of counsel at their deportation hearings violated due process). "[Any] argument to the contrary," the Sixth Circuit continued, "confuses the substance of the [petitioners'] claim with the remedy requested." *Id.* Hence, the fact that the effect of Petitioners' claim may be to prevent the Attorney General from executing a deportation order against Mr. Botezatu is not dispositive. Otherwise, as the Third Circuit cautioned,

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statutory and constitutional foundation for other decisions made during his removal proceedings").

"every deportation-related challenge . . . could be deemed a suit to stop the 'execution' of a deportation order." *DeSousa v. Reno*, 190 F.3d 175, 182 (CA3 1999). Thus, where there is no challenge to the merits of the Attorney General's decision to prosecute, the Third, Fourth, Sixth, Ninth, and Eleventh Circuits are "satisfied that [the petitioner] has not presented a challenge 'arising from the decision or action . . . to execute removal orders.'" *Zhislin v. Reno*, 195 F.3d 810, 814 (CA6 1999) (quoting *AADC*, 525 U.S. at 482).

B. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH OTHER COURTS OF APPEALS BY GIVING §1252(G) A BROADER INTERPRETATION THAN JUSTIFIED BY ITS LANGUAGE OR THIS COURT'S DECISION IN *AADC*.

The Seventh Circuit also stands apart from the other circuits with regard to the breadth of its application of §1252(g) -- that is, its interpretation is unduly expansive. The Seventh Circuit understands *AADC* to stand for the proposition that §1252(g) precludes habeas review of all challenges to "'no deferred action' decisions and similar discretionary determinations" irrespective of whether they challenge a decision or action to commence proceedings, adjudicate cases, or execute removal orders. *Botezatu*, 195 F.3d at 314 (App. A). In other words, under the Seventh Circuit's model, *all* of the Attorney General's discretionary decisions are immune from habeas review.

Clearly, this view is overbroad. In fact, it directly conflicts with *AADC*'s observation that it is "implausible" to claim that §1252(g)'s "mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings." 525 U.S. at 482. Moreover, the Seventh Circuit's broad interpretation of §1252(g) would preclude jurisdiction even in cases that *AADC* expressly indicates fall *outside* the scope of §1252(g). For instance, while the Court's opinion in *AADC* noted that "decisions to open an investigation . . . and to refuse reconsideration of [a deportation] order" do not come within the ambit of §1252(g),[5] even these two examples fit comfortably within the Seventh Circuit's expansive view of §1252(g) because they constitute "similar discretionary determinations." Indeed, the Fourth and Sixth Circuits as well as the Northern District of California have noted that "[b]ecause some of the examples [listed in *AADC*] could be squeezed into one of the three listed actions if the actions were to be read expansively, the examples reinforce the Court's express statement that §1252(g) 'applies only to

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[5]525 U.S. at 482 ("There are of course many other decisions or actions that may be part of the deportation process -- such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order. It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings.").

three discrete actions.'"[6]

In contrast to the Seventh Circuit's broad view of §1252(g), a majority of the Courts of Appeals that have faced this issue have held that, as a result of *AADC*'s narrow construction of §1252(g), claims *arising from* the deportation process are not necessarily barred. In *Zhislin v. Reno*, 195 F.3d 810, 813 (CA6 1999), for example, the Sixth Circuit relied on this Court's opinion in *AADC* in concluding that "claims arising from [the deportation process] are still subject to the jurisdiction of the federal courts." The Sixth Circuit therefore held that a petitioner's due process claims are subject to judicial review if they arise from the

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[6]*Mustata v. U.S. Dep't of Justice*, 179 F.3d 1017 1021 (CA6 1999) (quoting *AADC*, 525 U.S. at 482) (holding that petitioner's ineffective assistance of counsel claim did not involve a challenge to the Attorney General's decision to commence proceedings, adjudicate cases, or execute removal orders and thus was reviewable on habeas). *See also Stewart v. INS*, 181 F.3d 587, 594 (CA4 1999) (concluding that habeas jurisdiction was available there because "a motion to reopen is very similar to a motion to reconsider" and *AADC* specifically excluded motions to reconsider from §1252(g)'s scope); *Garcia-Guzman v. Reno*, 65 F. Supp. 2d 1077, 1082-83 (N.D. Cal. 1999) ("To confirm the narrowness of section 1252(g), the Court also listed examples of 'many other' decisions or actions that are part of the deportation process *but nevertheless fall outside section 1252(g)'s reach.* These examples all cover decisions that could arguably be construed as part of the decision to commence proceedings or adjudicate cases. Thus, §1252(g) is properly read to cover only the three discrete actions enumerated therein.").

deportation proceedings so long as they do not directly challenge the three discrete events listed in §1252(g). Likewise, the Eighth Circuit observed in *Shah v. Reno*, 184 F.3d 719, 722 (CA8 1999), that "[t]he words 'commence proceedings, adjudicate cases, or execute removal orders' refer to separate and discrete actions in the deportation process" and consequently §1252(g) "has nothing to do" with cases where "review is sought of a final order of deportation." The First, Fourth, Fifth, Tenth, and Eleventh Circuits have all reached similar conclusions.[7]

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[7]*See Wallace v. Reno*, 194 F.3d 279, 285 (CA1 1999) (noting that "[t]he Supreme Court's surprisingly narrow reading of [§1252(g)] . . . certainly does not encourage us to enlarge the reach of that section" and concluding that the federal courts may entertain habeas petitions challenging the constitutionality of final orders of deportation); *Selgeka v. Carroll*, 184 F.3d 337, 341 (CA4 1999) (holding that §1252(g) did not apply to due process claim challenging the refusal to permit petitioner to present his application to an immigration judge in a deportation hearing); *Requena-Rodriguez v. Reno*, 190 F.3d 299, 303 (CA5 1999) (holding that district courts have jurisdiction to hear habeas petitions that challenge a final order of deportation because such a challenge does not fall under one of the three discrete actions listed in §1252(g)); *Jurado-Gutierrez v. Greene*, --- F.3d ---- (CA10 1999) (1999 U.S. App. LEXIS 30711, at *13) (holding that a final order of deportation remains reviewable on habeas because it does "not interfere with the Attorney General's decision to commence proceedings, adjudicate cases, or execute a removal order"); *Richardson v. Reno*, 180 F.3d 1311, 1312 (CA11 1999), *rehearing en banc denied*, 193 F.3d 525 (CA11 1999) (concluding, based on this Court's interpretation of §1252(g), that a habeas petition challenging the constitutionality of petitioners' removal from the United States or their detention while awaiting

Some courts have gone even further. For example, the Third Circuit, in facing a similar issue, relied on the fact that *AADC* "explicitly rejected a broad interpretation" of §1252(g) in concluding that the statute "*only applies* to suits challenging the government's selective enforcement of the immigration laws." *DeSousa v. Reno*, 190 F.3d 175, 182 (CA3 1999) (emphasis added). Because the petitioner's claim in that case "was not brought on this ground," the Third Circuit ruled that §1252(g) did not preclude consideration of a habeas petition challenging the final order of deportation issued against him. *Id.* at 182-83 ("As [§1252(g)] does not apply to DeSousa, . . . the district court had jurisdiction to consider DeSousa's habeas petition, including both his constitutional and statutory claims.").

Thus, under the view taken by the First, Third, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits, Petitioners' claims would not be barred by §1252(g) because they do not challenge the three discrete decisions protected by the statute. Petitioners have not challenged the Attorney General's decision to commence proceedings, adjudicate a

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removal does not constitute a challenge to the decision to commence proceedings, adjudicate cases, or execute removal orders, although ultimately holding that habeas jurisdiction was not available in that case based on other provisions of post-IIRIRA law); *Mayers v. Reno*, 175 F.3d 1289, 1297 (CA11 1999) (holding that final orders of deportation are reviewable because §1252(g) excludes from judicial review only three discrete decisions or actions of the Attorney General).

case, or execute a removal order against Mr. Botezatu, but rather the processes by which various decisions were made after his deportation hearing.

II. THE SEVENTH CIRCUIT'S DECISION IMPROPERLY AND UNNECESSARILY RAISES THE SERIOUS CONSTITUTIONAL QUESTION CONCERNING THE SCOPE OF CONGRESS'S POWER TO STRIP THE FEDERAL COURTS OF JURISDICTION OVER CONSTITUTIONAL CLAIMS.

In ruling against Petitioners and adopting such an expansive view of §1252(g), the Seventh Circuit construed the statute to foreclose judicial review of constitutional claims arising from INS proceedings that take place after a deportation hearing. The court's decision thus unnecessarily creates what this Court has referred to as "a serious constitutional question" -- the extent to which Congress has the constitutional power to restrict the jurisdiction of the federal courts. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986).[1]

This Court has consistently cautioned that there is a "well-settled presumption favoring interpretations of statutes

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[1]For a description of the controversy that this issue has generated among academics and a summary of the four competing approaches that have been taken to it, see Erwin Chemerinsky, Federal Jurisdiction § 3.3, at 191 (3d ed. 1999).

that allow judicial review of administrative action." *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 480 (1991). Therefore, "where Congress intends to preclude judicial review of constitutional claims," this Court has held that Congress's "intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (citing *Johnson v. Robinson*, 415 U.S. 361, 373-74 (1974)). Clear evidence of congressional intent is required "in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* (quoting *Bowen*, 476 U.S. at 681 n.12). In this case, however, not only did the Court of Appeals construe "a federal statute . . . to deny any judicial forum for a colorable constitutional claim," but it did so without a clear showing of congressional intent to preclude judicial review of those claims, and in spite of this Court's deliberately limited decision in *AADC*.

The Seventh Circuit's creation of this serious constitutional question began with its mischaracterization of the claims Petitioners presented to the court on appeal. The Court of Appeals understood Petitioners to be challenging the *results* of proceedings that took place after the INS decided to deport Mr. Botezatu -- specifically, the INS's refusal to grant his requests for a stay of deportation, reinstatement of voluntary departure, and humanitarian parole. As explained above in Part I(A), however, Petitioners' procedural due process claims are not challenging the *results* of these proceedings or the *result* of

Mr. Botezatu's deportation hearing. Instead, they are challenging the *procedures* used by the INS in making these decisions.

Based on its erroneous assumption about the nature of Petitioners' claims, the Seventh Circuit determined that this Court's decision in *AADC* precludes the federal courts from hearing this case. In so doing, the Court of Appeals not only ignored this Court's refusal to give §1252(g) an excessively broad reading (as explained above in Part I(B)), but also ignored *AADC*'s description of §1252(g) as "specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings." 525 U.S. at 486. Petitioners, however, are not seeking "separate rounds of judicial intervention." *Id.* at 485. Rather, their claims focus on the procedures used by the INS in making decisions *after* Mr. Botezatu's deportation hearing, claims that did not arise and therefore could not possibly have been raised on his direct appeal from that hearing.[2]

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[2]For this reason, Petitioners' case is also distinguishable from the situation presented to this Court in *Felker v. Turpin*, 518 U.S. 651 (1996). *Felker* upheld the constitutionality of a provision in the Antiterrorism and Effective Death Penalty Act that prohibited this Court from reviewing the lower courts' denial of a "second or successive" habeas petition. Petitioners' claims do not involve a "second or successive" request for review of the constitutionality of INS procedures. Instead, this case constitutes Petitioners' first and only opportunity to challenge the constitutionality of INS procedures used subsequent to Mr. Botezatu's deportation hearing. Additionally, in upholding the statutory provision at issue in *Felker*, the Court noted that Congress did "not deprive

The Seventh Circuit's mischaracterization of Petitioners' case and its failure to recognize the difference between their claims and those this Court held to be covered by §1252(g) yields a disconcerting result: the federal courts are stripped of jurisdiction to consider any constitutional challenges arising from INS proceedings subsequent to a deportation hearing. Nothing in this Court's decision in *AADC* or in the legislative purposes underlying §1252(g) indicates that Congress intended to grant the INS such broad immunity from constitutional accountability. By ignoring this Court's admonition that the long-standing presumption favoring judicial review of administrative decisions can be overcome only by clear evidence of congressional intent, the Seventh Circuit improperly created "the 'serious constitutional question' that [arises when] a federal statute [is] construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. at 603 (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. at 681 n.12).

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this Court of jurisdiction to entertain original habeas petitions." *Id.* at 654. In this case, however, if the Seventh Circuit's expansive interpretation of §1252(g) is upheld, Petitioners have no alternative judicial forum comparable to the one that existed in *Felker*.

III. THIS CASE RAISES RECURRING, IMPORTANT ISSUES THAT THIS COURT SHOULD RESOLVE.

The recent flood of federal cases cited in this petition demonstrates that the factual scenario involved in this case -- a claim, via a habeas petition, alleging systemic problems at the INS that deprive petitioners and others similarly situated of due process or other constitutional rights -- is hardly unique. In addition to this case, decisions from nine other circuits have likewise involved INS attempts to dismiss habeas petitions for want of jurisdiction pursuant to §1252(g). In each case, the INS argued that §1252(g) bars challenges that relate to the Attorney General's exercise of her discretion to prosecute (i.e., deport or remove). Without exception, the petitioners have responded that their challenges do not constitute an attack on the Attorney General's decision to "commence proceedings, to adjudicate cases, or to execute removal orders" and, moreover, that their challenges do not impermissibly tread on her prosecutorial discretion. The issue presented in this petition is thus both important and recurring.

In this case, Petitioners seek habeas relief to address systemic problems at the INS that violated their constitutionally guaranteed rights to procedural due process by: (1) failing to hold *any* hearings on certain applications

from them and others; (2) pre-judging the merits of (i.e., "front-desking") certain applications before they were actually filed; and (3) discouraging asylum applicants from seeking appellate review of INS orders. The Seventh Circuit thought that §1252(g) barred these complaints because they amounted to attacks on the Attorney General's refusal to grant deferred action. That holding is possible only under an understanding of §1252(g) that ignores this Court's original explanation for construing §1252(g) narrowly to include only three discrete actions along the way to deportation. The decision below has broad implications for the scope of §1252(g) and creates a conflict with the rule of law applied by the great majority of the Courts of Appeals – a conflict that is unlikely to disappear given the Seventh Circuit's consistent adherence to an expansive interpretation of §1252(g) in cases other than this one.[1] Accordingly, this

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[1] *See Bhatt v. Reno*, --- F.3d --- (CA7 1999) (1999 U.S. App. LEXIS 26545, at *7-8) (noting that "we have consistently decided that . . . §1252(g) foreclose[s] virtually all judicial review of deportation, including habeas review" and that petitioners are left only with "the safety valve of direct review" of their deportation hearings in the courts of appeals); *Fedorca v. Perryman*, 197 F.3d 236, 240 (CA7 1999) (giving lip service to the view that §1252(g) "precludes review of only the three listed discretionary decisions or actions of the Attorney General," but then going on to deny jurisdiction in that case because "[i]f [the petitioner's] motion to reopen his deportation proceedings had been successful, . . . it would have abrogated the . . . deportation order"); *Musto v. Perryman*, 193 F.3d 888, 891 (CA7 1999) (observing that "because [petitioner] is challenging his administrative adjudication and removal order, the *catch-all* provision of

issue warrants immediate resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[§1252(g)] applies to further bar judicial review") (emphasis added).

U.S. 7TH CIRCUIT COURT OF APPEALS

Plaintiffs-Appellants,
v.
IMMIGRATION AND NATURALIZATION SERVICE and BRYAN PERRYMAN, Chicago District Director of the Immigration and Naturalization Service,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 1965--George W. Lindberg, Judge.
Argued June 8, 1999--Decided October 21, 1999

Before COFFEY, EASTERBROOK and ROVNER, Circuit Judges.

ROVNER, Circuit Judge. Emil Botezatu, a native of Romania, entered the United States as a non- immigrant alien in transit on March 19, 1993 with his fianc, Gabriela, also Romanian, with whom he had been living nearly continuously since 1988. Upon arrival, each filed a claim for political asylum with the Immigration and Naturalization Service. Her application for asylum was granted and she became a lawful permanent resident alien, but his application was denied. He was authorized to remain until March 24, 1993, but he did not leave this country at that time. In June 1994, the INS issued an order to show cause alleging that he was deportable as an alien who remained in the United States

beyond the authorized period. See 8 U.S.C. sec.sec. 1227, 1231(a)(1)(B). On June 30, 1995, an immigration judge found Botezatu deportable, denied his asylum application, and granted his application for voluntary departure.

On August 17, 1995, Botezatu married Gabriela. In January 1996, she filed a visa petition on her husband's behalf as a spouse of a permanent resident. The INS approved the petition, but no visas in the permanent resident category were available for him. On August 5, 1996, the Board of Immigration Appeals (the "Board") affirmed the immigration judge's decision of June 30, 1995, indicating that Botezatu might apply for an extension of the voluntary departure period. He petitioned this court to review the Board's decision but did not apply for an extension. In April 1997, we denied his petition in an unpublished order.

Botezatu requested that the INS District Director reinstate his voluntary departure. The District Director denied this request because, he said, Botezatu had violated the terms of his voluntary departure by failing to seek an extension after the Board's decision. The INS agreed, however, to postpone Botezatu's deportation while his request was pending for humanitarian parole or deferred action on the grounds of his desire to remain in this country with his wife. The agency denied this request in February 1998. Botezatu filed for a stay of deportation, but in March 1998, the District Director denied this application and the INS then ordered Botezatu to report for deportation on March 31, 1998.

On that date, however, the Botezatus instead filed this lawsuit in federal district court contesting several determinations of the Board relating to Emil Botezatu's deportation. They alleged that the district court had subject matter jurisdiction under 42 U.S.C. sec. 1983 (civil rights), 5 U.S.C. sec. 701 et seq. (the Administrative Procedure Act), and 28 U.S.C. sec.sec. 1331 (federal question jurisdiction) and 2241 (habeas corpus). Their complaint alleged that several actions or decisions of the Board violated various amendments to the federal Constitution, provisions of the International Covenant on Civil and Political Rights, and customary norms of international law. The INS argued that the complaint should be dismissed for want of subject matter jurisdiction and the district court agreed, dismissing the case on November 20, 1998. The Botezatus appeal.

We review a dismissal for want of subject matter jurisdiction de novo. Jones v. United States, 112 F.3d 299, 301 (7th Cir. 1997), cert. denied, 118 S.Ct. 173 (1997). At issue is whether this case is governed by sec. 242(g) of the Immigration and Nationality Act ("INA"), as amended by sec. 306(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-546 ("IIRIRA"), and the proper interpretation of this provision in view of recent caselaw. The statute reads:

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to

hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

8 U.S.C. sec. 1252(g)./1 The Supreme Court has recently rejected the interpretation that "sec. 1252(g) covers the universe of deportation claims--that it is a sort of 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review.'" Reno v. American-Arab Anti-Discrimination Committee, 119 S.Ct. 936, 943 (1999) ("ADC"). In ADC, the Court held that sec. 1252(g) precludes only review of the three discretionary decisions or actions listed in the statute, namely, decisions to "'commence proceedings, adjudicate cases, or execute removal orders.'" Id. The Botezatus argue that sec. 1252(g) does not apply to their case because they do not challenge any of these three listed types of decisions, but only the constitutionality of various post- deportation procedures. In particular, the Botezatus contend that the district court has jurisdiction over their claims attacking the INS's decisions in: (1) refusing to grant Botezatu's request for a stay of deportation, (2) failing to reinstate his administrative grant of voluntary departure, and (3) denying his request for humanitarian relief in the form of humanitarian parole.

The plaintiffs' arguments are not persuasive. They claim that the district court has jurisdiction over the INS's refusal to issue a stay of deportation, citing Cheng Fan Kwok v. INS,

392 U.S. 206 (1968). There the Supreme Court read the former INA sec. 106(a)(10), the then- effective immigration habeas provision, to provide a jurisdictional basis for a district court to review a stay of deportation. The Court held that in such an attack, the "petitioner did not attack the deportation order itself." Id. at 213. Unfortunately for the Botezatus, the statutory provision construed in Cheng which formerly allowed for the review they request has been repealed by sec. 401(e) of the Anti- Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), see LaGuerre v. Reno, 164 F.3d 1035, 1038 (7th Cir. 1998), and the jurisdictional basis for district court review of a stay of deportation was removed by sec. 1252(g). In interpreting sec. 1252(g), the Supreme Court has disapproved Cheng, treating denial of a stay of deportation as one of "various decisions . . . leading up to or consequent upon final orders of deportation" which was within the scope of sec. 1252(g). ADC, 118 S.Ct at 944. The plaintiffs cite several cases suggesting that, notwithstanding sec. 1252(g), a district court may review denials of some other forms of ancillary relief not at issue here. Perhaps so. However, in ADC, the Supreme Court has indicated that a denial of a stay of deportation is not among the actions or decisions to which sec. 1252(g) is inapplicable.

The plaintiffs further contend that the Supreme Court's limited holding in ADC about the short list of decisions over which the district court lacks jurisdiction under sec. 1252(g) (decisions to commence proceedings, adjudicate cases, or

execute removal orders) means that the district court has jurisdiction to review the refusal to reinstate Botezatu's voluntary departure or to grant him humanitarian parole or deferred action. This, they argue, is because they do not make a direct attack upon the final order of deportation nor on an order made during the deportation proceedings. The relief they request is not, therefore, on the list of precluded items. However, in ADC, the Supreme Court unambiguously read "'no deferred action' decisions and similar discretionary determinations" as governed by sec. 1252(g), saying that Congress intended to give these sorts of determinations "some measure of protection" from judicial review and provided that "if they are reviewable at all, they at least will not be made bases for separate rounds of judicial intervention." 119 S.Ct. at 944. Review of refusal to grant deferred action is for this reason excluded from the jurisdiction of the district court.

The question remains whether the INS's refusal to grant humanitarian parole or to reinstate Botezatu's voluntary departure falls within the class of "similar discretionary determinations" which the Supreme Court treated as relevantly analogous to "no deferred action" decisions, and so within the scope of sec. 1252(g). The plaintiffs themselves concede that humanitarian parole is a sort of relief functionally equivalent to deferred action--they request these two kinds of relief in the alternative. In any event they fail to suggest any distinctions among deferred action, humanitarian parole and voluntary departure which would exclude the

latter two from the scope of sec. 1252(g) if deferred action comes under it. The distinction, if any, was theirs to make, and since they did not make it, the point is waived. See Parrillo v. Commercial Union Ins. Co., 85 F.3d 1245, 1249-1250 (7th Cir. 1996). The district court, then, had no jurisdiction over the Botezatus' claims, and was correct to dismiss the claims on that basis.

AFFIRMED.

/1 Botezatu's case is governed by the IIRIRA transition rules because removal proceedings commenced in this case before April 1, 1997. Thus, we consider the effect only of section 1252(g), and not any other subparts of that section. See Lalani v. Perryman, 105 F.3d 334, 336 (7th Cir. 1997) (as of April 1, 1997, subsection (g) will apply retroactively, unlike the other subsections).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

January 5, 2000

Before
Hon. John L. Coffey, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Iliana Diamond Rovner, Circuit Judge

No. 98-4155

Emil and Gabriela Botezatu	) Appeal from the United States
Plaintiffs-Appellants	) District Court for the Northern
	) District of Illinois, Eastern
v.	) Division.
	)
Immigration and	) No. 98 C 1965
Naturalization Service	)
and Bryan Perryman,	)
Chicago District Director	) George W. Lindberg,
of the Immigration and	) Judge.
Naturalization Service,	)
Defendants-Appellees.	)

ORDER

Plaintiffs-appellants filed a petition for rehearing and

petition for rehearing en banc on December 6, 1999. No judge in regular active service has requested a vote on the petition for rehearing en banc and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

Emil Botezatu V. INS
Case No: 98-cv-01965
ND Ill, October 21, 1998
Judge George W. Lindberg

Respondent Immigration and Naturalization Services (INS) requests the dismissal of petitioner Emil Botezatu's petition for a writ of habeas corpus for lack of subject matter jurisdiction. Botezatu is currently awaiting deportation to Romania. He entered the United States on March 19, 1993, and applied for political asylum. The INS denied the application on May 3, 1994. In June 1995, an administrative judge found Botezatu to be deportable and granted plaintiff voluntary departure if he left the United States before October 30, 1995. The court order indicated that if plaintiff did not leave within the specified period, the privilege of voluntary departure automatically converted into a final order of deportation. In July 1995, Botezatu appealed the order of deportation to the Board of Immigration Appeals (BIA). On August 17, 1995, petitioner married Gabriela Botezatu. In January 1996, petitioner's wife filed a visa petition on his behalf for a spouse of a permanent resident. Although the INS approved the visa petition, no visas within this category are currently available. Petitioner failed to depart the United States as of October 30, 1995. The BIA affirmed the order of deportation on August 5, 1996. Botezatu appealed to the United States Court of Appeals for the Seventh Circuit, which affirmed on April 17, 1997. On March 13, 1998, the INS again ordered Botezatu to report for

deportation, this time by March 31, 1998. On that date, Botezatu filed the instant petition to stay his deportation and obtain review of the INS' deportation procedures. After reviewing the petition, this court must now dismiss for lack of subject matter jurisdiction. Petitioner presents three bases for jurisdiction: 28 U.S.C. § 2241, 42 U.S.C. § 1983 and 5 U.S.C. § 701. Not only do these statutes fail to give this court jurisdiction over the petition but § 242(g) of the Immigration and Nationality Act (INA) specifically divests this court of jurisdiction over it. 8 U.S.C. § 1252(g). The section states that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g). Plaintiff claims that he is not directly appealing a final order of deportation but rather the hearing process afforded by the INS, making § 242(g) inapplicable. This argument is not persuasive. First, plaintiff filed this complaint on the last day available to stay his deportation, indicating that the complaint is "arising from" the final order of deportation. Second, the language of § 242(g) governs the hearing process as well as final orders of deportation when it gives the Attorney General exclusive jurisdiction over its power "to commence proceedings" and "adjudicate cases." Nor do the additional statutes petitioner cites provide jurisdiction. Section 242(g)'s grant of exclusive jurisdiction to the Attorney General over deportation cases divests district courts of their habeas corpus jurisdiction under 28 U.S.C. §

2241. Yang v. INS, 109 F.3d 1185, 1195 (7th Cir. 1997). Section 1983 may only be invoked when a person acting "under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia" deprives a person of a right guaranteed by the Constitution. 42 U.S.C. §1983 (emphasis added); see Wheedlin v. Wheeler, 373 U.S. 647, 650 (1963). In the present case, no state statute, ordinance or regulation is at issue but instead the actions of a federal agency. Finally, 5 U.S.C. § 701 is inapplicable to agency action that "is committed to agency discretion by law," which is the case here. Lalani v. Perryman, 105 F.3d 334, 337 (7th Cir. 1997). For these reasons, the court grants the motion to dismiss for lack of subject matter jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

EMIL AND GABRIELLA BOTEZATU,	)	
PLAINTIFFS	)	
V.	)	
IMMIGRATION AND NATURALIZATION SERVICE AND BRYAN PERRYMAN, CHICAGO DISTRICT DIRECTOR OF IMMIGRATION AND SERVICE	)	[date stamp:] RECEIVED MAR 31 1998 Michael W. Dobbins Clerk, U.S. District Court [illegible]
DEFENDANTS)	)	MAGISTRATE JUDGE ASHMAN

COMPLAINT

Emil and Gabriela Botezatu (collectively "Plaintiffs" or the "Botezatus"), by their attorneys, hereby complain of defendants Immigration and Naturalization Service, and Bryan Perryman, the Chicago District Director of the Immigration and Naturalization Service, and for their

Complaint Plaintiffs state as follows:

The Parties

1. Plaintiff Gabriela Botezatu ("Mrs. Botezatu") is a Lawful Permanent Resident of the United States and resides in Chicago, Illinois. In March 1993, Mrs. Botezatu fled her native Romania and came to the United States seeking asylum. She was granted asylum on October 5, 1993. A copy of the decision granting her asylum is annexed.

[stamp:] RECEIVED 3-31-98
UNITED STATES ATTORNEY
NORTHERN DISTRICT
CHICAGO, ILLINOIS
REC'D BY _____ SM
[Illegible] NOT VERIFIED

2. Plaintiff Emil Botezatu ("Mr. Botezatu") is Mrs. Botezatu's husband. The couple have resided together continuously since 1988. In March 1993, Mr. Botezatu came to the United States seeking asylum. However, his asylum case was denied. Mr. Botezatu has no criminal record at all.

3. Defendant INS is an agency of the federal government within the Department of Justice and is the agency in charge of enforcing the INA, 8 U.S.C. §1101 et. seq.

4. Defendant Chicago District Director of the INS is charged with the duty of administration and

enforcement of all the functions and powers and duties of the INS.

Jurisdiction and Venue

5. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §2241 (Habeas Corpus), U.S.C. §1331 (Federal Questions); 42 U.S.C. §1983 (Civil Rights Statutes) and the Administrative Procedures Act, 5 U.S.C. §701 et. seq.

6. Venue is proper in this district under 28 U.S.C. §1391(b) because a substantial part of the events giving rise to Plaintiff's claims occurred here.

Facts

7. Plaintiffs Emil and Gabriela Botezatu were born in Romania and grew up there under the rule of Communist Dictator Nicolae Ceauescu.

8. Mr. Botezatu grew up in an abusive home. He met Mrs. Botezatu in 1988 and began dating her. Later that year, he was invited to move in with her family and did so. He has lived with Mrs. Botezatu continuously since that time up to present.

9. The Botezatus opposed the regime of Communist Dictator Nicolae Ceausescu and later opposed the regime of his successor Ion Iliescu. They participated in demonstrations together and had similar problems on account of their political opinions.

10. The Botezatus lived together but did not marry during this time. In light of their political problems,

they knew they might have to flee Romania at any time and were informed by colleagues that their chances of obtaining a visa to come to the United Sates were better if they were married. (See Affidavit of Gabriela Botezatu, annexed as part of Group Exhibit 1).

11. On March 19, 1993 the Botezatus fled Romania and made separate claims for asylum in the United States. Prior to claiminig asylum, they were mistakenly advised by the person who assisted them with their asylum applications not to get married prior to making their claims.

12. The Botezatus filed separate asylum applications in 1993. Despite the fact that these were separate applications, virtually all of the core facts were the same.

13. On October 5, 1993, Mrs. Botezatu was granted asylum by the INS asylum office. The asylum grant indicates that the INS has determined that Mrs. Botezatu has a well-founded fear of persecution should she return to Romania. A copy of Mrs. Botezatu's asylum grant is annexed as part of Group Exhibit 1.

14. Mr. Botezatu's asylum claim was denied by the INS asylum office and his case was eventually presented to an immigration judge in deportation proceedings. The judge denied the case and Mr. Botezatu appealed.

15. In the meantime, in light of the changed circumstances (i.e. Mrs. Botezatu already won her case and Mr. Botezatu was fighting his), the couple were legally

married on August 17, 1995. A copy of their marriage certificate is annexed as part of Group Exhibit 1.

16. Mrs. Botezatu became a Lawful Permanent Resident on June 1, 1994 and in January, 1996, she applied for permanent residence for Mr. Botezatu. This application was approved on 1996, but there are currently no visa numbers available for Mr. Botezatu to immigrate pursuant to this approved petition. A copy of the approval is annexed as Exhibit 2.

17. On April 7, 1997 Mr. Botezatu exhausted the appeals on his asylum case when the United States Court of Appeals for the Seventh Circuit rejected the appeal.

18. On May 1, 1997 Mr. Botezatu, through newly retained counsel, filed a motion to reinstated the period of voluntary departure granted to him by the immigration judge and the Board of Immigration Appeals. A copy of his Motion for Reinstatement is annexed as Exhibit 3.

19. The INS did not respond to the Motion and on May 30, 1997 a second request was sent to the INS regarding this issue. A copy of the second request is annexed as Exhibit 4.

20. On June 6, 1997, the INS denied the Motion to Reinstate Voluntary Departure. A copy of the denial is annexed as Exhibit 5. No reason was given for the denial if this Motion.

21. The Chicago District Officer of the INS does not have a consistent policy on extending or reinstating

voluntary departure during a Seventh Circuit appeal of an asylum case and, on information and belief, may be using its ability to grant extensions/reinstatement as a means to discourage asylum applicants from pursuing non-frivolous appeals. In one case, counsel was informed by a deportation officer that refusal to extend/reinstated voluntary departure was done to penalize people who "sue the INS" by seeking Seventh Circuit review of asylum cases.

22. On June 20, 1997 Mr. Botezatu erroneously received a form I-166, a "bag and baggage" letter, requesting that he report for deportation to Bulgaria on July 10, 1997. A copy of this letter is annexed as Exhibit 6.

23. On July 8, 1997, Mr. Botezatu's counsel called the deportation officer in charge of Mr. Botezatu's case. A letter confirming parts of this conversation is annexed as Exhibit 7. In this conversation, counsel informed the officer that a mistake had been made and that Mr. Botezatu was from Romania, not Bulgaria. In addition, during the foregoing conversation counsel informed the officer that Mr. Botezatu would be seeking a stay of deportation, deferred action, or in the alternative humanitarian parole. Before any discussion of the facts of Mr. Botezatu's case, the officer informed counsel that the request for a stay would be denied, and that he was under a directive to deny all requests for a stay unless they involved serious medical reasons.

24. On information and belief, within the last 2-3 years the Chicago District office of the INS has adopted a

policy of automatically denying, without thorough consideration, requests for stays of deportation unless based on serious medical reasons. Other factors are not considered.

25. In addition, during the above conversation, the deportation officer requested that counsel not file an application for a stay of deportation since such requests required him to work since they had to be responded to in writing. The officer also informed counsel of another directive that any request for a stay would automatically result in Mr. Botezatu being taken into INS custody and jailed.

26. During the foregoing conversation, the deportation officer agreed to postpone Mr. Botezatu's deportation while his request for humanitarian parole, or in the alternative, deferred action, was pending. (See Exhibit 7)

27. Mrs. Botezatu filed Group Exhibit 1, a request for humanitarian parole for Mr. Botezatu or in the alternative deferred action on July 9, 1997, paying the filing fee of $70. The request was accompanied by a letter from U.S. Senator Carol Moseley-Braun, expert and fact affidavits, economic and other evidence attesting to the humanitarian and public interest reasons for keeping Mr. Botezatu and his wife together in the United States.

28. Approximately one week later, the deportation officer called counsel and informed him that because the request for humanitarian parole or alternatively deferred action was accompanied by a Senator's letter, his superiors had told him that he could not keep his earlier

agreement and would have to take action to deport Mr. Botezatu, but would give him additional time to prepare for deportation.

29. Soon after this conversation, in or around August 1997, the Washington D.C. office of the INS made an inquiry into the case. At this time, counsel spoke again with the deportation officer who agreed not to take action in the case until the request for humanitarian parole had been adjudicated. Counsel was informed that humanitarian parole requests were handled by the examination branch of the INS and that this branch had not yet requested Mr. Botezatu's file. Counsel requested that the humanitarian parole request be adjudicated. A letter confirming this request is annexed as Exhibit 8.

30. Counsel was subsequently informed that the Washington D.C. office of the INS had referred the matter back to the Chicago District Office for a decision and on October 21, 1997 counsel spoke again with the deportation officer who informed him that the humanitarian parole request was being handled by the Examinations Branch of the INS and that such requests could not be handled by the Deportation Branch. During the conversation, the officer informed counsel that he had spoken to someone from the Examinations Branch and that there was a 90% chance that the humanitarian parole application would be denied. However, the officer informed counsel at the Examinations Branch had not looked at the file.

31. In or around January 1998 the examinations

branch of the INS called counsel and informed him that it could not grant the humanitarian parole request because humanitarian parole requests could not be granted for people present in the United States. Counsel informed the INS that this was not the law and ran contrary to INS regulations and practice. In fact, the INS has granted humanitarian parole to people present in the United States. The officer's response was that the matter would be handled by the deportation branch and to call them.

32. Counsel called the District Director and other officials several times to correct the misunderstanding of law regarding humanitarian parole. Within the next few days, counsel received a call from one of the supervisors at the Deportation Branch who informed counsel that the Deportation Branch could not consider humanitarian parole requests. She advised counsel to file an application for a stay of deportation. Since neither the Deportation Branch nor the Examinations Branch could advise counsel who or how the humanitarian parole application would be decided, counsel filed an application application for a stay of deportation on February 4, 1998. A copy of the application for a stay of deportation and cover letter are annexed as Exhibit 9. Counsel re-submitted, as part of the application for a stay of deportation, all of the affidavits and other supporting exhibits contained in Group Exhibit 1.

33. In early February 1998 Defendants wrote Plaintiffs a letter denying them "advance parole". A copy of the letter is annexed as Exhibit 10. The letter merely states that they don't qualify for "advance parole". The letter does

not contain any standards for determining humanitarian parole of discuss the arguments made by Plaintiffs.

34. On March 11, 1998 the stay of deportation was denied. A copy of the denial is annexed as Exhibit 11.

35. On March 13, 1998 the INS issued another "bag and baggage letter" requesting that Mr. Botezatu report for deportation on March 31, 1998, and placing him in the constructive custody of the INS. A copy of this letter is annexed as Exhibit 12.

36. The Defendants never held a hearing on whether Mr. Botezatu, who is married to an asylee/lawful permanent resident, may remain in the United States.

37. Neither Mr. nor Mrs. Botezatu have returned to Romania since fleeing there in 1993.

COUNT I

(Violation of the Substantive Due Process Protected by the Fifth, Ninth, Tenth and Other Amendments of the U.S. Constitution)

38. Plaintiffs re-allege and incorporate paragraphs 1 through 37 as if fully set forth herein.

39. The United States Supreme Court has found that there are certain

fundamental rights emanating from the guarantees of the

United States Constitution. Among those rights is the right to privacy, which includes freedom from government intervention in family affairs, particularly in marital relationships.

40. The actions of the defendants in attempting to deport Mr. Botezatu and in refraining from taking actions which would allow him to stay in the United States substantially interfere with his and his family's right to privacy in that the defendants will be wrenching apart Mr. Botezatu from his wife.

41. There are no compelling state interests for the defendant's interference in this case since Mr. Botezatu has never been convicted of any crimes and, by all accounts, has been a useful member of society for the past five years he has been here.

42. Mr. and Mrs. Botezatu have been injured and damaged by the defendants interference with their marriage in that they may be separated for at least 10 years and would be subjected to additional substantial hardships if Mr. Botezatu is deported.

COUNT II

(Violation of Article 23 of the International Convention of Civil and Political Rights)

43. Plaintiffs re-allege and incorporate paragraphs 1 through 42 as if fully set forth herein.

44. Article II of the United States Constitution declares all treaties of the United States to be Federal Law.

45. The United States is a signatory to the International Convention of Civil and Political Rights (the "Convention"), which was ratified in 1992.

46. Article 23 of the Convention obligates signatory states, including the United States, to protect the right of marriage.

47. In deporting Mr. Botezatu, in refraining from taking actions to allow him from taking action to allow him to stay in the United States, and in failing to hold any sort of hearing regarding him staying in the United States based on his marriage, the INS is in violation of Article 23 of the Convention.

48. Plaintiffs have been damaged by defendant's actions in that they may be separated for at least 10 years and would be subjected to additional substantial hardships if Mr. Botezatu is deported.

COUNT III

(Violation of Pre-emptory Standards of International Law/*jus cogens*. Through

Interference with Right of Marriage)

49. Plaintiffs re-allege and incorporate paragraphs 1 through 48 as if fully set forth herein.

50. Marriage is a recognized human right under U.S. national and customary international law. (See e.g., Universal Declaration of Human Rights, Article 16, American Convention of Human Rights)

51. The United States is obligated to follow customary international law. (See Article II, Section 2, U.S. Const. See also Restatement of Law of Foreign Relations.3rd, Section 101, 102 and 111)

52. The United States is obligated to refrain from gross and consistent patters of violation of human rights under international law, (see e.g., Restatement of the Law of Foreign Relations 3rd sections 701 and 702).

53. By deporting Emil Botezatu and possibly subjecting him to a 10 separation from his wife, the United States government substantially interferes with the Botezatus' right of marriage. By denying the Botezatus the right to a hearing on the merits whether relief should be granted and Emil Botezatu should be allowed to remain in the United States, the United States commits a gross violation of their human rights.

51. By refusing the same right to other persons similarly situated, believed upon information and belief to number in the hundreds if not thousands, the United States engages in a consistent pattern of abusing human rights, in violation of its obligations under the U.S. Constition and pre-emptory standards of international law, (*jus cogens*).

54. By deporting Mr. Botezatu, failing to

accommodate his requests to stay in the United States (humanitarian parole, stay of deportation) and failing to hold a hearing on whether he should be separated from his wife, the INS has violated customary international law.

55. Plaintiffs have been damaged by defendant's actions in that they may be separated for at least 10 years and would be subjected to additional substantial hardships if Mr. Botezatu is deported.

COUNT IV

(Flawed Decision Making Procedures on Stays of Deportation Resulting in the Denial of

Procedural Due Process Under the Fifth Amendment of the U.S. Constitution)

56. Plaintiffs re-allege and incorporate paragraphs 1 through 55 as if fully set forth herein.

57. The Fifth Amendment of the United States Constitution provides that "No person shall...be deprived of life, liberty or property, without due process of law."

58. The Defendant policy of pre-deciding requests for stays of deportation before they are even filed and automatically denying, without thorough consideration, stays of deportation for people unless they have serious medical problems, violates procedural due process.

59. In addition, the Defendants erred as a matter of law in failing to address the legal factors necessary for a

stay and the case law regarding stays of deportation in similar circumstances.

60. Defendant's also erred as a matter of fact in failing to recognize that Plaintiffs damages are far worse than other who may be separated in that in other cases, the person with immigration status in the U.S. can reside their spouse, whereas in this case Mrs. Botezatu cannot reside with Mr. Botezatu in Romania since the INS has already determined that she has a well-founded fear of persecution should she return there.

61. Plaintiffs were severely damaged and prejudiced by the due process violations outlined above, in that they were denied a fair hearing on their request for a stay, Mr. Botezatu is now scheduled to be deported from the United States and may be barred from being with his wife for 10 years.

COUNT V

(Flawed Decision Making Procedures on Extensions and Reinstatement of Voluntary Departure Resulting in the Denial of Procedural Due Process Under the Fifth Amendment of the U.S. Constitution)

62. Plaintiffs re-allege and incorporate paragraphs 1 through 65 as if fully set forth herein.

63. The Fifth Amendment of the United States

Constitution provides that "No person shall… be deprived of life, liberty or property, without due process of law."

The Defendants failure to adopt a procedure on humanitarian parole, failure to enunciate any legal standards or specific reasons for denying it in this case violates due process of law.

64. The Defendants also erred as a matter of law in failing to recognize that under their own regulations and practice and humanitarian parole applications may be granted to people in the United States.

65. Plaintiffs were severely damaged and prejudiced by the due process violations outlined above, in that Mr. Botezatu was denied his previously granted privilege of voluntary departure, is scheduled to be deported from the United States, and may be barred from immigrating to the United States to be with his wife for the next 10 years.

COUNT VI

(Flawed Decision Making Procedures on Humanitarian Parole Applications Resulting in the Denial of Procedural Due Process Under the Fifth Amendment of the U.S. Constitution)

66. Plaintiffs re-allege and incorporate paragraphs 1 through 70 as if fully set forth herein.

67. The Fifth Amendment of the United States Constitution provides that "No person shall …be deprived of life, liberty or property, without due process of law."

68. The Defendants failure to adopt a procedure on humanitarian parole, failure to enunciate any legal standards or specific reasons for denying it in this case violates due process of law.

69. The Defendants also erred as a matter of law in failing to recognize that under their own regulations and practice humanitarian parole applications may be granted to people in the United States.

70. Plaintiffs were severely damaged and prejudiced by the due process violations and errors or law outlined above, in that Mr. Botezatu is scheduled to be deported from the United States, and may be barred from immigrating to the United States to be with his wife for the next 10 years.

COUNT VII

(Inconsistent Decision Making Procedures in Asylum Process Resulting in the Denial of Procedural Due Process Under the Fifth Amendment of the U.S. Constitution)

71. Plaintiffs re-allege and incorporate paragraphs 1 through 70 as if fully set forth herein.

72. The Fifth Amendment of the United States Constitution provides that "No person shall... be deprived of life, liberty or property, without due process of law."

73. The Defendants violated due process in denying Mr. Botezatu asylum while granting it to Mrs.

Botezatu when the Botezatu's lived together in Romania and many of the core facts of their cases are identical.

74. Plaintiffs were severely damaged and prejudiced by the due process violations and errors or law outlined above, in that Mr. Botezatu was denied asylum, is scheduled to be deported from the United States, and may be barred from immigrating to the United States to be with his wife for the next 10 years.

COUNT VIII

(Cruel and Unusual Punishment in Violation of the Eighth Amendment of the United States Constitution)

75. Plaintiffs re-allege and incorporate paragraphs 1 through 74 as if fully set forth herein.

76. The Eighth Amendment to the United States Constitution provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

77. Deporting Mr. Botezatu would be cruel and unusual punishment in violation of the Eighth Amendment in that he has not committed any crimes, may be separated from his wife for at least 10 years and be subjected to additional substantial hardships if deported.

WHEREFORE, Plaintiffs prays that this honorable court:

I. Issue an order prohibiting the INS from detaining Mr. Botezatu pending the resolution of this case,

and allowing him to stay in the United States until such time as a decision rendered by this Court after a full review of the merits of this case.

II. Issue an order compelling the Defendants to allow Mr. and Mrs. Botezatu to stay together in the United States since their separation violates their right to privacy and the above treaties.

III. Issue an order compelling Defendants to remedy the procedural problems set forth above since they violate due process of law.

IV. Grant Plaintiffs their attorney's fees under the Equal Access to Justice Act, 28 U.S.C.§2412.

V. Grant any other and further relief that this Court may deem fit and proper.

Respectfully Submitted,

PLAINTIFFS,

By: s/Robert A. Perkins

Robert A. Perkins,

One of their attorneys

Robert A. Perkins

Robert A. Perkins & Associates

601 S. LaSalle St. Suite 210

Chicago, Illinois 60605
(312)461-1199

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1345 Wiley Road, Suite 116
Schaumburg, Illinois 60173
(847)755-1290

U.S. Department of Justice
Immigration and Naturalization Service
Notice of Action – Voluntary Departure

Please refer to this file number:

File: A72 135 377

To: (Enter full name and mailing address of aliens)

Botezatu, Emil

Date: June 6, 1997

707 W. Waveland, Apt. 1109

Chicago, IL 60613

MAT WIT ATTY

Ph#

Please note: the blocks checked below relate to action taken in your case.

☐ You have violated the terms of your admission as a nonimmigrant. Consequently, the permission previously granted you to remain in the United States is rescinded. You are required to depart from the United States at your own expense on or before _____

☐ In accordance with a decision made in your case, you are required to depart from the United States at your own expense on or before _____
UNDER INS SAFEGUARDS.

☐ Your request for an extension of time to depart from the United States has been _____.
You are required to depart on or before _____.

(Approved/denied)

☐ The amount of time that you have been granted to depart voluntarily is the maximum allowable under the law in your situation. You are, therefore, prohibited from applying for or being granted any further voluntary departure.

☒ Your request for voluntary departure has been denied since you were previously granted voluntary departure and failed to depart.

☐ You are ineligible for voluntary departure because you were previously permitted to depart voluntarily after you were found inadmissible as an alien who was present without having been admitted or paroled.

☐ You must notify this office on or before _____ of the arrangements you have made to effect your departure, including the date, place and manner. Use the enclosed self-addressed card to notify this office regarding departure arrangements. Postage is not required. At the time of your departure, you must surrender Form I-94, ARRIVAL-DEPARTURE RECORD, in accordance with instructions on that form.

NOTICE: Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and action being taken to effect your removal. Failure to depart on or before the specified date may also subject you to a possible civil penalty of not less than $1,000 and not more than $5,000, and render you ineligible for a period of 10 years for any further authorization for voluntary departure or

for relief under sections 240A, 245, 248, and 249 of the Immigration and Nationality Act.

If there is a bond outstanding in your case, you are warned that, to expedite cancellation of the bond and return of the collateral posted, you must make advance arrangements with this office to have your departure witnessed by an officer of this Service.

_____

Sincerely,

Acknowledgement of Receipt

s/ illegible
Brian R. Perryman

District Director

s/illegible

INS Officer Serving this Form/Office/Date

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
10 WEST JACKSON BOULEVARD
CHICAGO, ILLINOIS 60604

PLEASE ADDRESS REPLY AND
REFER TO THIS FILE NO.
A 72 135 377

[stamp:] Feb 05 1998

Mr. Emil Botezatu
707 W. Waveland, Apt. 1109
Chicago, Illinois 60613

Dear Mr. Botezatu:

This is in response to your request for authorization for humanitarian parole of alien into the United States, filed on July 9, 1997.

After careful review and consideration of the facts presented, it has been concluded that you do not fall under any of the categories of aliens who are eligible for issuance of an advance parole pursuant to O.I. 212.5(c). Therefore,

your application for an advance parole is hereby denied. There is no appeal of this decision.

Sincerely,

s/Brian R. Perryman

Brian R. Perryman

District Director

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
10 WEST JACKSON BOULEVARD
CHICAGO, ILLINOIS 60604

IN THE MATTER OF:

BOTEZATU, EMIL
(A72 135 377)

IN BEHALF OF APPLICANT: Robert A. Perkins
Attorney at Law
601 S. LaSalle Street
Chicago, Illinois 60605

APPLICATION: Stay of Deportation – Title 8, Code of Federal Regulations, Part 241.6

BASIS OF APPLICATION: On February 05, 1998, the applicant filed an application for a stay of deportation on Form I-246. The reasons for the stay request the applicant has provided are as follows:

Mr. Botezatu's deportation would cause emotional and economic hardship. His spouse can

not return to their own country since she has been granted asylum in the United States.

BACKGROUND: The applicant is a 34-year-old native and citizen of Romania who last entered the United States at Chicago, Illinois, on March 19, 1993, as an alien in transit. On April 8, 1993, the applicant filed for asylum. On April 12, 1994, the applicant's request for asylum in the United States was denied. On June 14, 1994, the Service issued an order to show cause to the applicant, charging deportability under Section 241(a)(1)(B) of the Immigration and Nationality Act (INA).

On June 30, 1995, the applicant was found deportable by an immigration judge, as the subject admitted the factual allegations contained in the order to show cause and conceded the charge of deportability. In lieu of deportation, voluntary departure was granted until October 30, 1995. The applicant appealed the immigration judge's decision to the Board of Immigration Appeals (BIA). On August 5, 1996, the BIA dismissed the applicant's appeal. On August 30, 1996, a petition for review was filed with the United States Court of Appeals. The Board of Immigration Appeals decision was affirmed by the Court.

On May 07, 1997, the applicant filed a motion to reinstate voluntary departure. On June 6, 1997, the request for reinstatement of voluntary departure was denied. A warrant of deportation was issued on June 20, 1997. On July 9, 1997, the applicant filed a request for humanitarian parole or deferred action. This application was adjudicated on February 05, 1998, and a denial notice was issued to the applicant.

DISCUSSION: The applicant and his spouse were married on August 17, 1995, long after deportation proceedings were initiated in 1994. He knew, prior to getting married, that he was expected to leave the United States. Even though the applicant is the beneficiary of an approved visa petition, the outstanding warrant of deportation cannot be overlooked.

Mr. Botezatu's spouse stated her inability to return to her own country. It is noted she was granted asylum in the United States and the Service at no time has indicated that she must depart. While the applicant and his spouse may experience hardship if he is deported, no evidence has been submitted that the hardships would be anymore severe than those normally associated with the deportation of a family member.

DECISION: I have reviewed the applicant's request for a

stay of deportation and his immigration history. After weighing all the facts available to me, I have determined as a matter of discretion to deny the applicant's request for a stay of deportation.

The application for a stay of deportation is denied.

s/illegible

Brian R. Perryman

District Director Date3/10/98

Supreme Court, U.S.
FILED
JUN - 9 2000
CLERK

(2)

No. 99-1627

In the Supreme Court of the United States

EMIL BOTEZATU AND GABRIELA BOTEZATU,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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21pp

QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1252(g) (Supp. IV 1998) deprived the district court of jurisdiction to review the Immigration and Naturalization Service's denial of the lead petitioner's applications for various forms of relief that would defer the execution of his final order of deportation.

2. Whether the Constitution requires judicial review of the lead petitioner's claims challenging the Immigration and Naturalization Service's decision to execute his deportation order, where petitioner is an indisputably deportable alien who has already received administrative and judicial review of his final order of deportation, including review of his application in his deportation proceedings for discretionary relief from deportation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Barahona-Gomez v. *Reno*, 167 F.3d 1228 (9th Cir. 1999)	13
Board of Regents v. *Roth*, 408 U.S. 564 (1972)	14
DeSousa v. *Reno*, 190 F.3d 175 (3d Cir. 1999)	12
Flores-Miramontes v. *INS*, No. 98-70924, 2000 WL 558024 (9th Cir. May 9, 2000)	12
Goncalves v. *Reno*, 144 F.3d 110 (1st Cir. 1998), cert. denied, 526 U.S. 1004 (1999)	12
Henderson v. *INS*, 157 F.3d 106 (2d Cir. 1998), cert. denied, *sub nom. Reno* v. *Navas*, 526 U.S. 1004 (1999)	12
INS v. *Yueh-Shaio Yang*, 519 U.S. 26 (1996)	15
Jay v. *Boyd*, 351 U.S. 345 (1956)	15
Jurado-Gutierrez v. *Greene*, 190 F.3d 1135 (10th Cir. 1999)	12
Kaczmarczyk v. *INS*, 933 F.2d 588 (7th Cir.), cert. denied, 502 U.S. 981 (1991)	3
LaGuerre v. *Reno*, 164 F.3d 1035 (7th Cir. 1998), cert. denied, 120 S. Ct. 1157 (2000)	12
Lalani v. *Perryman*, 105 F.3d 334 (7th Cir. 1997)	15
Liang v. *INS*, 206 F.3d 308 (3d Cir. 2000)	11
Magana-Pizano v. *INS*, 200 F.3d 603 (9th Cir. 1999)	12
Mapoy v. *Caroll*, 185 F.3d 224 (4th Cir. 1999), cert. denied, 120 S. Ct. 1417 (2000)	8, 10, 11
Max-George v. *Reno*, 205 F.3d 194 (5th Cir. 2000)	11
Mayers v. *Reno*, 175 F.3d 1289 (11th Cir. 1999)	12

Cases—Continued: Page

Mustata v. *United States Dep't of Justice*, 179 F.3d 1017 (6th Cir. 1999) 13
Reno v. *Amrerican-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) 4, 6, 7, 8, 9, 10, 12, 14
Requena-Rodriquez v. *Pasquarell*, 190 F.3d 299 (5th Cir. 1999) 12
Richardson v. *Reno*, 180 F.3d 1311 (11th Cir. 1999), cert. denied, 120 S. Ct. 1529 (2000) 12
Selgeka v. *Carroll*, 184 F.3d 337 (4th Cir. 1999) 13
Shah v. *Reno*, 184 F.3d 719 (8th Cir. 1999) 12
Stewart v. *INS*, 181 F.3d 587 (4th Cir. 1999) 13, 14
Tefel v. *Reno*, 180 F.3d 1286 (11th Cir. 1999), petition for cert. pending, No. 99-1314 (2000) 13
Wallace v. *Reno*, 194 F.3d 279 (1st Cir. 1999) 12
Walters v. *Reno*, 145 F.3d 1032 (9th Cir. 1998), cert. denied, 526 U.S. 1003 (1999) 13
Zhislin v. *Reno*, 195 F.3d 810 (6th Cir. 1999) 12, 13

Constition, statutes and regulations:

U.S. Const. Amend. V (Due Process Clause) 14
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 12
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. I, 110 Stat. 3009-546 8-9
§ 306, 110 Stat. 3009-607 6
§ 306(c)(1), 110 Stat. 3009-612 6
§ 309(c)(1), 110 Stat. 3009-625 6
§ 309(d)(2), 110 Stat. 3009-627 6
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1151(b) (1994 & Supp. IV 1998) 3
8 U.S.C. 1153(a) 3
8 U.S.C. 1182(d)(5)(A) (Supp. IV 1998) 4
8 U.S.C. 1252(g) (Supp. IV 1998) 6, 7, 8, 9, 10, 11, 12, 13, 14
28 U.S.C. 2241 11

Regulations—Continued: Page

8 C.F.R.:
Section 212.5 4
Section 212.5(a) 4
Section 212.5(e) 4
Section 240.57 3
Section 241.6 5

Miscellaneous:

5 Charles Gordon et al., *Immigration Law and Procedure* (1998) 4
H.R. Rep. No. 469, 104th Cong., 2d Sess., Pt. 1 (1996) 15
S. Rep. No. 249, 104th Cong., 2d Sess. (1996) 15

In the Supreme Court of the United States

No. 99-1627

EMIL BOTEZATU AND GABRIELA BOTEZATU,
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v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 29-35) is reported at 195 F.3d 311. The opinion of the district court (Pet. App. 38-40) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1999. A petition for rehearing was denied on January 5, 2000. Pet. App. 36-37.[1] The petition for a writ of certiorari was filed on April 4, 2000. The

[1] The reported version of the decision below mistakenly sets forth the date of denial of rehearing as December 6, 1999. See 195 F.3d at 311.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Emil Botezatu and his wife Gabriela Botezatu are natives and citizens of Romania.[2] On March 19, 1993, petitioner and Gabriela (who was then petitioner's fiancée) entered the United States as non-immigrant aliens. Each filed an application for asylum with the Immigration and Naturalization Service (INS). The INS granted Gabriela's application but denied petitioner's. Petitioner was authorized to remain in the United States until March 24, 1993, but he never departed. Pet. App. 29.

On June 14, 1994, the INS issued an Order to Show Cause, charging that petitioner was deportable as an alien who remained in the United States beyond the authorized period. On June 30, 1995, an immigration judge (IJ) found petitioner deportable as charged, denied his applications for asylum and withholding of deportation, and granted his application for voluntary departure. Pet. App. 29-30, 67.

Petitioner appealed to the Board of Immigration Appeals (BIA). On August 17, 1995, while that appeal was pending, petitioner married Gabriela, who was by then a lawful permanent resident alien. Pet. App. 30. In January 1996, Gabriela filed with the INS an immigrant visa petition on petitioner's behalf, seeking his classification as the spouse of a permanent resident, for the purpose of eventually obtaining adjustment of his own status to that of a lawful permanent resident. Although the INS approved the petition, no immigrant

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[2] The claims of Gabriela Botezatu are entirely derivative of those of Emil Botezatu, and so we refer to Emil as "petitioner."

visas in that category were available when it was approved.[3] Pet. App. 30.

On August 5, 1996, the BIA affirmed the IJ's decision ordering petitioner deported. In its decision, the BIA indicated that petitioner was permitted to depart voluntarily from the United States within 30 days of the date of its decision, but that if he failed to do so he would be deported as provided in the IJ's order. The BIA also indicated that petitioner could apply to the INS District Director for an extension of the voluntary departure period. Petitioner filed a petition for review of the BIA's decision with the Seventh Circuit, but failed to seek an extension of time to depart voluntarily.[4] On April 7, 1997, the Seventh Circuit affirmed the BIA's order in an unpublished decision. Pet. 5; Pet. App. 30.

2. On May 1, 1997, petitioner filed a request with the INS District Director for reinstatement of his voluntary departure pursuant to 8 C.F.R. 240.57. Pet. 5; Pet. App. 30. On June 6, 1997, the District Director denied that request because petitioner had previously violated the terms of his voluntary departure by remaining in

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[3] Under the Immigration and Nationality Act (INA), immgrant visas for spouses of lawful permanent residents, unlike visas for spouses of citizens, are subject to numerical restrictions and priority dates. See 8 U.S.C. 1151(b) (1994 & Supp. IV 1998) (only "children, spouses, and parents of a citizen of the United States" can qualify for "immediate relative" status exempting them from numerical limitations); 8 U.S.C. 1153(a) (specifying allocation of immigrant visas for spouses of lawful permanent residents). Petitioner's priority date had not been reached. Pet. App. 30.

[4] Under Seventh Circuit case law, the filing of a petition for review did not automatically toll the running of the voluntary departure period. *Kaczmarczyk* v. *INS*, 933 F.2d 588, 598, cert. denied, 502 U.S. 981 (1991).

the country past the date set by the BIA without obtaining an extension. *Id.* at 30, 61-63. On July 9, 1997, petitioner filed a request for humanitarian parole and, in the alternative, for deferred action. Pet. 6; Pet. App. 30, 64-65.[5] On February 5, 1998, the INS denied petitioner's request for humanitarian parole. The INS's

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[5] Under the INA and its implementing regulations, parole may be granted only for "urgent humanitarian reasons" or "significant public benefit." See 8 U.S.C. 1182(d)(5)(A) (Supp. IV 1998); 8 C.F.R. 212.5. The regulation lists examples of certain aliens for whom parole would "generally be justified," such as aliens who have "serious medical conditions," pregnant aliens, certain juveniles, alien witnesses, and aliens whose detention "is not in the public interest." 8 C.F.R. 212.5(a). Although there is some uncertainty, petitioner apparently sought "advance parole" (see Pet. App. 64-65), which is a procedure by which the INS grants, in advance, permission for an alien to depart from and reenter the United States. The advance parole regulation does not set forth specific standards for granting or denying such parole. See 8 C.F.R. 212.5(e). The INS Operating Instructions indicate that there are six classes of persons who may be granted advance parole, including aliens seeking such parole for "emergent or humanitarian considerations." See 5 Charles Gordon et al., *Immigration Law and Procedure* § 62.02[2] (1998). As an alternative to humanitarian parole, petitioner also sought "deferred action." Pet. 6; Pet. App. 30. As this Court explained in *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-484 (1999), "deferred action" refers to the INS's practice of exercising discretion to defer taking action against an apparently deportable alien for humanitarian reasons or simply for its own convenience. Before 1997, deferred-action decisions were governed by internal INS guidelines, which considered, *inter alia*, factors such as the likelihood of ultimately removing the alien and whether the alien had violated a provision that had been given high enforcement priority. *Id.* at 484 n.8. Those deferred-action guidelines were rescinded on June 27, 1997, but the INS continues to exercise its deferred-action authority on a case-by-case basis.

letter denying humanitarian parole did not address the request for deferred action. *Id.* at 64-65.

On February 5, 1998, petitioner filed with the INS an application for a stay of deportation pursuant to 8 C.F.R. 241.6. Pet. App. 66-69. On March 10, 1998, the District Director denied petitioner's application for a stay of deportation in the exercise of his discretion. *Ibid.* The District Director explained that petitioner was subject to a final order of deportation, that his marriage occurred after the IJ had found him deportable and denied his application for relief, and that petitioner had failed to provide any evidence that his deportation would cause him or his wife to suffer hardship any more severe than that of any other deportee or family member. *Id.* at 68. Accordingly, the INS issued an order requiring petitioner to report for deportation on March 31, 1998. *Id.* at 30.

3. On March 31, 1998, petitioner filed a complaint in district court seeking to enjoin the INS from executing his deportation order. Pet. App. 41-60. Petitioner alleged that his deportation would violate various constitutional provisions and international law.[6] *Id.* at 50-58. Respondents moved to dismiss, arguing that the court's jurisdiction over the complaint was precluded by

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[6] Apart from the claims relating to the denial of his applications for reinstatement of voluntary departure, humanitarian relief, and stay of deportation, petitioner abandoned his other claims on appeal to the Seventh Circuit and does not pursue them before this Court.

8 U.S.C. 1252(g) (Supp. IV 1998),[7] which provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

On November 20, 1998, the district court dismissed the complaint for lack of subject-matter jurisdiction, agreeing with the government that jurisdiction is precluded by Section 1252(g). Pet. App. 31, 38-40. The court found unpersuasive petitioner's contention that Section 1252(g) is inapplicable because he is not directly appealing an order of deportation, but rather is attacking the "hearing process" afforded by the INS. *Id.* at 39. The court concluded that petitioner's claims do indeed "aris[e] from" the final order of deportation, as demonstrated by the fact that petitioner filed his

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[7] Section 1252(g) was added to the INA by Section 306 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. I, 110 Stat. 3009-607, 3009-612. Most of IIRIRA's provisions were made applicable only to removal proceedings commenced on or after April 1, 1997. See IIRIRA § 309(c)(1), 110 Stat. 3009-625. Congress made an exception, however, for Section 1252(g), which was made applicable "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under [the INA]." IIRIRA § 306(c)(1), 110 Stat. 3009-612; see *AADC*, 525 U.S. at 477-487. Additionally, although Section 1252(g) itself refers only to "removal" orders, IIRIRA § 309(d)(2) provides that all references in law to "removal" orders are deemed to include exclusion and deportation orders (such as petitioner's deportation order) as well. 110 Stat. 3009-627.

complaint on the day he was to report for deportation. *Ibid.*

4. The court of appeals **affirmed**. **Pet.** App. 29-35. Relying on this Court's decision in *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) *(AADC)*, the court of appeals ruled that petitioner's efforts to obtain a stay of execution of his final order of deportation fall within the claims for which district court jurisdiction is precluded by Section 1252(g). After observing that Section 1252(g) applies to three discrete actions of the Attorney General concerning deportation proceedings, including decisions to "execute" removal orders, the court concluded that petitioner's challenges arise out of the decision of the Attorney General to "execute" his removal order. Pet. App. 32-33.

The court noted that this Court in *AADC* described the INS's denial of a stay of a final order of deportation as one of the decisions or actions of the Attorney General falling within the scope of Section 1252(g). Pet. App. 33 (citing *AADC*, 525 U.S. at 484-485). It also concluded that the INS's decisions not to reinstate petitioner's voluntary departure or grant him humanitarian parole fall within Section 1252(g)'s scope because they are "relevantly analogous to 'no deferred action' decisions," which the Court in *AADC* characterized as governed by Section 1252(g). *Id.* at 34-35 (citing *AADC*, 525 U.S. at 485). It also rejected petitioner's argument that Section 1252(g) does not apply because he challenges "the constitutionality of various post-deportation procedures," not any of the three kinds of decisions listed in Section 1252(g). Pet. App. 32-33. The court emphasized that in *AADC*, this Court "unambiguously read '"no deferred action" decisions and similar

discretionary determinations' as governed by § 1252(g)." *Id.* at 34 (quoting *AADC*, 525 U.S. at 485).

ARGUMENT

Petitioner argues (Pet. 8) that the court of appeals erred in ruling that 8 U.S.C. 1252(g) (Supp. IV 1998) divested the district court of jurisdiction over his claims relating to the INS's denial of his applications for a stay of deportation, voluntary departure, and humanitarian parole. The court of appeals' decision is correct and does not conflict with any decision of any other court of appeals. The Court recently denied review of a petition raising similar contentions in *Mapoy* v. *Carroll*, 120 S. Ct. 1417 (2000), and there is no basis for a different result in this case. Further review is therefore not warranted.

1. a. The court of appeals correctly concluded that district court jurisdiction over petitioner's claims is precluded by Section 1252(g). Petitioner seeks to prevent the execution of his deportation order by arguing that the INS erred in denying him a form of relief from such execution, such as a stay, voluntary departure, or humanitarian parole, all of which reside in the Attorney General's discretion. In denying petitioner those forms of relief, the INS in effect made a decision to execute his removal order. Section 1252(g) precludes district court jurisdiction over "the decision or action by the Attorney General to * * * execute removal orders against any alien," and therefore barred district court jurisdiction in this case.

The decision below correctly follows this Court's decision in *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) *(AADC)*. In *AADC*, the Court noted that, before the enactment of the Illegal Immigration Reform and Immigrant

Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. I, 110 Stat. 3009-546, aliens were able to file suit in district court raising issues collateral to the removal order, such as challenges to refusals by the Attorney General to stay deportation, see 525 U.S. at 485, or to grant "deferred action," *id.* at 483-485.[8] Section 1252(g) was intended to restrict judicial review of those types of claims in order to preserve the Attorney General's discretion to proceed or not proceed at "various stages in the deportation process." *Id.* at 483. Petitioner's claims fall directly within the preclusive scope of Section 1252(g) because he seeks to challenge the Attorney General's exercise of discretion to remove him from the United States following and pursuant to the entry of a final order of deportation, which was itself upheld by the court of appeals. See *id.* at 486 n.9 ("Section 1252(g) was directed against a particular evil: attempts to impose judicial constraint on prosecutorial discretion.").

Petitioner argues (Pet. 15) that his claims do not fall within the scope of Section 1252(g) because he is challenging, not the merits of the INS's decision not to grant him relief from execution of the final order of deportation, but the constitutionality of the procedures

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[8] With regard to deferred action, the Court explained:

> At each stage the Executive has discretion to abandon the endeavor, and at the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as "deferred action") of exercising that discretion for humanitarian reasons or simply for its own convenience. * * * Section 1252(g) seems clearly designed to give some measure of protection to "no deferred action" decisions and similar discretionary determinations.

AADC, 525 U.S. at 483-485.

the INS used in reaching that decision. Nothing in the text of Section 1252(g) or this Court's decision in *AADC* suggests, however, that Section 1252(g) is limited to "substantive" as opposed to "procedural" challenges. Section 1252(g) sweepingly refers to "*any* cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to * * * execute removal orders." 8 U.S.C. 1252(g) (Supp. IV 1998) (emphasis added). That language is on its face broad enough to include claims of procedural irregularity. The court of appeals therefore correctly concluded that the INS's decisions to deny discretionary relief in this case fall "within the class of similar discretionary determinations which the Supreme Court treated as relevantly analogous to no deferred action decisions, and so within the scope of § 1252(g)." Pet. App. 34 (internal quotation marks omitted).[9]

b. The decision below is consistent with the decisions of other courts of appeals. In *Mapoy* v. *Carroll*, 185 F.3d 224 (1999), cert. denied, 120 S. Ct. 1417 (2000), the Fourth Circuit concluded that Section 1252(g) divested the district court of jurisdiction to review an alien's challenge to the INS's denial of an administrative stay of deportation pending resolution of a motion

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[9] Petitioner's argument is also undermined by this Court's rejection in *AADC* of the aliens' constitutional argument that their selective prosecution claim required immediate judicial review because delaying such review would deprive them of the opportunity for adequate factual development and would have a "chilling effect" on their First Amendment rights. 525 U.S. at 488. Thus, even the assertion of a constitutional claim did not preclude the application of Section 1252(g) in *AADC* to divest the district court of jurisdiction. Section 1252(g) is not inapplicable merely because petitioner characterizes his claim as a constitutional challenge to the INS's post-order procedures.

to reopen before the BIA. In *Mapoy*, like this case, the alien's refusal to depart voluntarily resulted in the entry of an order of deportation, which the INS then sought to enforce. *Id.* at 228. The court stressed that the alien was challenging the BIA's denial of his motion to stay the execution of his deportation order, and was therefore challenging the decision of the Attorney General to execute that order. *Ibid.* The court concluded that the claim "clearly arose from the INS's decision to execute a removal order and is subject to § 1252(g)." *Ibid.* No court of appeals has issued a contrary holding.[10]

Petitioner's contention that the decision below conflicts with decisions of other courts of appeals (see Pet. 10-11 n.2) is without merit. Most of the decisions cited by petitioner involve the different question whether, after enactment of IIRIRA, the district courts retain authority under 28 U.S.C. 2241 to consider statutory and constitutional challenges to the merits of final orders of deportation.[11] Petitioner, however, is not

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[10] Petitioner argues that the court of appeals gave an overly expansive reading to Section 1252(g) by concluding that "all of the Attorney General's discretionary decisions are immune from habeas review." Pet. 17 (emphasis omitted). The court of appeals did not so hold, however, and it noted that Section 1252(g) "precludes only review of the three discretionary decisions or actions listed in the statute." Pet. App. 32. The court further observed, however, that in *AADC* this Court "indicated that a denial of a stay of deportation is not among the actions or decisions to which § 1252(g) is inapplicable." *Id.* at 33.

[11] Compare *Max-George* v. *Reno*, 205 F.3d 194, 198 (5th Cir. 2000) (holding that district courts lack jurisdiction under Section 2241 to review such challenges to final orders of removal in cases governed by IIRIRA's "permanent rules" for proceedings commenced on or after April 1, 1997), with *Liang* v. *INS*, 206 F.3d 308, 317 (3d Cir. 2000) (indicating that district courts do have such

challenging his final order of deportation. Rather, he is seeking to require the INS to exercise its discretion to allow him to remain in this country despite the existence of an indisputably valid final order of deportation. No court of appeals has held that such a claim falls outside the scope of Section 1252(g).

Other cases cited by petitioner (Pet. 10-11 n.2) are inapposite as well. In *Zhislin* v. *Reno*, 195 F.3d 810 (6th Cir. 1999), the court concluded that Section 1252(g) did not deprive the district court of jurisdiction to

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authority) and *Flores-Miramontes* v. *INS*, No. 98-70924, 2000 WL 558024 (9th Cir. May 9, 2000) (same); see also *Richardson* v. *Reno*, 180 F.3d 1311, 1315 (11th Cir. 1999) (stating that district courts lack such authority), cert. denied, 120 S. Ct. 1529 (2000). A similar conflict in the circuits concerning district court jurisdiction arose under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, and IIRIRA's "transitional rules" for deportation cases commenced before April 1, 1997. Compare *LaGuerre* v. *Reno*, 164 F.3d 1035 (7th Cir. 1998) (holding that district courts lacked jurisdiction to review final orders of deportation), cert. denied, 120 S. Ct. 1157 (2000), with *Magana-Pizano* v. *INS*, 200 F.3d 603, 608-609 (9th Cir. 1999); *Wallace* v. *Reno*, 194 F.3d 279, 285 (1st Cir. 1999); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1146-1147 (10th Cir. 1999); *Requena-Rodriguez* v. *Pasquarell*, 190 F.3d 299, 303 (5th Cir. 1999); *DeSousa* v. *Reno*, 190 F.3d 175, 182-183 (3d Cir. 1999); *Shah* v. *Reno*, 184 F.3d 719, 722 (8th Cir. 1999); *Mayers* v. *Reno*, 175 F.3d 1289, 1297 (11th Cir. 1999); *Henderson* v. *INS*, 157 F.3d 106, 118-119 (2d Cir. 1998), cert. denied *sub nom. Reno* v. *Navas*, 526 U.S. 1004 (1999); and *Goncalves* v. *Reno*, 144 F.3d 110, 116-123 (1st Cir. 1998), cert. denied, 526 U.S. 1004 (1999) (all holding that district courts had jurisdiction to review the merits of final orders of deportation entered against criminal aliens). This Court noted the existence of that conflict in *AADC*, 525 U.S. at 480 n.7, but denied the government's certiorari petitions on the issue in *Navas* and *Goncalves*, *supra*, as well as the alien's petition on the same issue in *LaGuerre*, *supra*. The Court's decision in *AADC* indicates that Section 1252(g) does not reach such challenges. See 525 U.S. at 482.

review a contention that an alien's continued detention following his order of removal (because no other country would accept his repatriation) violated various constitutional provisions. The court made clear, however, that the alien was not challenging "the right of the Attorney General to execute the [deportation] order." *Id.* at 814. In *Mustata* v. *United States Department of Justice*, 179 F.3d 1017 (6th Cir. 1999), the court held that Section 1252(g) did not prevent the district court from entering a stay of deportation where the aliens were challenging their final deportation orders on the merits and sought a stay only as a matter of remedy. See *id.* at 1023.[12] In *Selgeka* v. *Carroll*, 184 F.3d 337 (4th Cir. 1999), the court held that Section 1252(g) did not prevent the district court from taking jurisdiction over an alien's contention that an IJ, rather than an INS asylum officer, should have conducted the review of his asylum application; the alien did not contest that "the Attorney General, through its designee, the BIA, [would] eventually adjudicate his case." *Id.* at 342. And in *Stewart* v. *INS*, 181 F.3d 587 (4th Cir. 1999), the court ruled that Section 1252(g) does not preclude review by the court of appeals of the merits of

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[12] Similarly, in *Tefel* v. *Reno*, 180 F.3d 1286, 1297 (11th Cir. 1999), petition for cert. pending, No. 99-1314 (filed Feb. 3, 2000); *Barahona-Gomez* v. *Reno*, 167 F.3d 1228, 1233-1234 (9th Cir. 1999); and *Walters* v. *Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998), cert. denied, 526 U.S. 1003 (1999), the courts held that Section 1252(g) did not divest the district courts of power to enjoin an alien's deportation, where the aliens were raising class-wide constitutional challenges to immigration practices but were not challenging the validity of the INS's decision not to stay execution of a particular deportation order, and where the aliens sought a class-wide stay of deportation only as a remedy for the alleged constitutional violation.

the BIA's denial of a motion to reopen, noting (*id.* at 593) that such denials of motions to reopen have long been treated as similar to a final order of deportation for purposes of invoking judicial review, and (*id.* at 593-594) that this Court specifically indicated in *AADC* that the refusal to reconsider a deportation order is not covered by Section 1252(g) (see 525 U.S. at 482).

2. There is no merit to petitioner's additional contention (Pet. 22-25) that interpreting Section 1252(g) to preclude district court jurisdiction in this case raises a "serious constitutional question" about Congress's power to restrict the jurisdiction of the federal courts to hear constitutional challenges to decisions by the Attorney General to execute final deportation orders and to deny relief from such final orders. Petitioner's allegations of procedural violations do not raise a substantial constitutional issue. Under petitioner's theory, the Due Process Clause would require the INS to grant him a second hearing to adjudicate his requests for a discretionary stay of deportation, reinstatement of voluntary departure, and humanitarian parole. There is, however, no constitutional right to any such hearing.

A due process claim is cognizable only if a constitutionally protected liberty or property interest is at stake. See *Board of Regents* v. *Roth*, 408 U.S. 564, 570-571 (1972). Although petitioner plainly had a constitutionally protected liberty interest in avoiding deportation, that liberty interest was extinguished when he was found deportable and a final order of deportation was entered against him. After that point, petitioner has no *additional* constitutionally protected liberty or property interest in remaining in the United States notwithstanding the existence of an order of deportation. Rather, the grant of any relief from a valid final order of deportation is a matter of administrative grace.

Cf. *Lalani* v. *Perryman*, 105 F.3d 334, 337-338 (7th Cir. 1997) (holding that because INS regulations concerning voluntary departure provide "no guidance as to how the [agency] decides whether to extend [or reinstate] voluntary departure," that decision is "unreviewable"). Cf. *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (suspension of deportation is an "act of grace" accorded pursuant to the Attorney General's "unfettered discretion" and is like "the President's [power] to pardon a convict") (quoting *Jay* v. *Boyd*, 351 U.S. 345, 354 & n.16 (1956)). Moreover, a ruling to the effect that the INS was constitutionally required to grant petitioner a hearing on his request for relief from a *final* order of deportation would conflict with Congress's intent, expressed manifestly in IIRIRA, that aliens unlawfully present in the United States be removed expeditiously. See H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 120-123 (1996); S. Rep. No. 249, 104th Cong., 2d Sess. 7 (1996). Accordingly, the Constitution does not require judicial review of the procedures by which the Attorney General exercises her post-order discretionary authority to execute a lawful removal order.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No.99-1627

In The

SUPREME COURT OF THE UNITED STATES

Emil and Gabriela Botezatu,

Petitioners,

v.

Immigration and Naturalization Service, et. al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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Cases **Page(s)**

Barahona-Gomez v. Reno,
167 F.3d 1228 (CA9 1999)... 6

Bowen v. Michigan Academy of Family Physicians,
476 U.S. 667 (1986)... ... ...3 n.2

DeSousa v. Reno, 190 F.3d 175 (CA3 1999)... ... ... 8 n.6

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185 F.3d 224 (CA4 1999),
cert. denied, 120 S. Ct. 1417 (2000)... 8

Mustata v. U.S. Dep't of Justice,
179 F.3d 1017 (CA6 1999)... 7

Reno v. American-Arab Anti-Discrimination Committee,
525 U.S. 471 (1999)..... ... ... *passim*

Selgeka v. Carroll, 184 F.3d 337 (CA4 1999)... ... ...7, 8

Stewart v. INS, 181 F.3d 587 (CA4 1999)... ... ...7, 8

Tefel v. Reno,
180 F.3d 1286 (CA11 1999),
cert. denied, 2000 U.S. Lexis 4002 (June 12, 2000)... ... ..6, n.4

Walters v. Reno,
145 F.3d 1032 (CA9 1998),
cert. denied, 526 U.S. 1003 (1999)... ... ... 3, 6

Webster v. Doe, 486 U.S. 592 (1988)... ... ... 3, n.2

Zhislin v. Reno, 195 F.3d 810 (CA6 1999)... 7

Statutes

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252(g)..... ... ... *passim*

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REPLY TO BRIEF IN OPPOSITION

Contrary to Respondents' suggestion, the court below incorrectly determined that Petitioners' procedural due process claims are subject to the jurisdiction-stripping provisions of § 242(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252(g) ("§ 1252(g)"), as interpreted by this Court in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S.

471 (1999) ("*AADC*"), and, in so holding, rendered a decision in direct conflict with the rulings of nine other courts of appeals.

Respondents argue that § 1252(g) applies to this case because "Petitioner seeks to prevent the execution of his deportation order by arguing that the INS erred in denying him a form of relief from such execution, such as a stay, voluntary departure, or humanitarian parole, all of which reside in the Attorney General's discretion" and "[i]n denying petitioner those forms of relief, the INS in effect made a decision to execute his removal order." Brief in Opposition at 8. But, as this Court recognized in *AADC*, § 1252(g) is "directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." 525 U.S. at 486 n.9. Petitioners' procedural due process claims do not challenge the manner in which the Attorney General exercised her prosecutorial discretion in this case – they do not challenge the substance of the decision to deny a stay of deportation, voluntary departure, or humanitarian parole. Rather, they challenge the procedures used in making those decisions: the failure to accord Petitioners any type of hearing even though deporting Mr. Botezatu undermines family unity by separating a married couple (since Mrs. Botezatu was granted asylum because returning to Romania is dangerous for her);[1] the Chicago District

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[1] Respondents try to minimize Mrs. Botezatu's interest in this case, Brief in Opposition at 2 n.2, but she has never been given any type of hearing – even though the INS is threatening to break up her marriage. Although Petitioners were not formally married until after an immigration judge denied Mr. Botezatu's asylum application (because they listened to erroneous advice they received from someone

Office's practice of denying voluntary departure in order to discourage asylum applicants from pursuing appeals; and its policy of automatically denying stays of deportation without any consideration whatsoever except for those based on serious medical reasons. Thus, Petitioners have not asked the courts to grant their requests on the merits or to find that the Attorney General abused her prosecutorial discretion in denying those requests, but merely to require Respondents to afford them procedural due process in considering those requests. *Cf. Walters v. Reno*, 145 F.3d 1032, 1052 (CA9 1998), *cert. denied*, 526 U.S. 1008 (1999) (rejecting the government's contention that § 1252(g) deprives the courts of jurisdiction to "order any relief that interferes with its attempt to execute deportation orders" and finding § 1252(g) inapplicable to procedural due process claim because "[a]lthough the constitutional violations ultimately may have led to the plaintiffs' erroneous deportation, the resulting removal orders were simply a consequence of the violations, not the basis of the claims" and "if the plaintiffs prevail on their claims, they will not be entitled to any substantive benefits" but only "to reopen their proceedings").[2]

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assisting them with their asylum requests), they have a long-standing relationship, having come to this country together and having lived together for the past twelve years. *See* Pet. App. at 43-45.

[2] Likewise, this case does not implicate § 1252(g)'s policy of discouraging "the deconstruction, fragmentation, and hence prolongation of removal proceedings." *AADC*, 525 U.S. at 487. Contrary to Respondents' suggestion, Mr. Botezatu is not seeking a "*second* hearing to adjudicate his requests for a discretionary stay of deportation, reinstatement of voluntary departure, and humanitarian parole." Brief in

The interpretation of § 1252(g) adopted by the court below and endorsed by Respondents – that the federal courts are deprived of jurisdiction whenever an alien's claims "'aris[e] from' the final order of deportation" or "arise out of the decision of the Attorney General to 'execute' [a] removal order," Brief in Opposition at 6, 7 (quoting the district court and court of appeals opinions below) – is in direct conflict with *AADC*'s explicit rejection of the contention that § 1252(g)'s "mention of three discrete events along the road to deportation was a shorthand way of referring to *all claims arising from deportation proceedings*." 525 U.S. at 482 (emphasis added). If § 1252(g) is deemed to apply whenever the *effect* of a claim is to prevent a deportation or delay the execution of a removal order, then – contrary to this Court's "narrow reading" of the statute in *AADC* – the provision no longer "applies only to three discrete actions," but has become "a sort of 'zipper' clause" that "covers the universe of deportation claims." *Id.* at 487, 482.[3]

Opposition at 14 (emphasis added). No hearing has *ever* been held on his constitutional challenges to the procedures used by the INS in denying these requests – decisions that were made *after* his deportation hearing – and thus the decision below does raise the "'serious constitutional question'" whether Congress has the power to "deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)).

[3] Contrary to Respondents' suggestion, *AADC*'s rejection of the selective prosecution claims raised in that case does not

Respondents claim that "[n]othing in the text of Section 1252(g) or this Court's decision in *AADC* suggests ... that Section 1252(g) is limited to 'substantive' as opposed to 'procedural' challenges." Brief in Opposition at 10. But this distinction between substantive and procedural challenges is precisely the one that has been adopted by a number of other courts of appeals. *See* Petition at 14-17. Respondents' efforts to distinguish those decisions – and thereby to minimize the conflict between the decision below and the rulings of other courts – are unpersuasive.

First, Respondents attempt to distinguish some of the decisions cited in the Petition on the grounds that, unlike this case, they involve challenges to a final order of deportation. Brief in Opposition at 11-12. But Respondents' argument that challenges to final orders of deportation are entitled to special treatment is reminiscent of the Attorney General's contention in *AADC* -- which this Court rejected – that § 1252(g) is "'a channeling provision, requiring aliens to bring

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undermine Petitioners' argument. Brief in Opposition at 10 n.9. The *AADC* plaintiffs' assertion that they were "target[ed] for deportation because of their affiliation with a politically unpopular group" was a "challenge to the Attorney General's decision to 'commence proceedings' against them" and thus, this Court held, "falls squarely within" the express language of § 1252(g). 525 U.S. at 472, 487. Petitioners, by contrast, do not challenge the Attorney General's decision to "commence proceedings" against them, but rather the procedures used in denying them certain remedies after Mr. Botezatu's deportation hearing.

all deportation-related claims in the context of a petition for review of a final order of deportation." 525 U.S. at 478.

Second, Respondents endeavor to distinguish other cases cited in the Petition on the grounds that they involve class actions. Brief in Opposition at 13 n.12. But there is no mention of that fact in two of those cases, and therefore no indication that it had any bearing on the courts' conclusion that § 1252(g) did not apply in those cases. *See Walters v. Reno*, 145 F.3d 1032, 1052 (CA9 1998), *cert. denied*, 526 U.S. 1008 (1999) (finding § 1252(g) inapplicable because the plaintiffs' "objective was not to obtain judicial review of the merits of their INS proceedings, but rather to enforce their constitutional rights to due process in the context of those proceedings"); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234 (CA9 1999) (same).[4]

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[4] Although the court in the third case, *Tefel v. Reno*, 180 F.3d 1286 (CA11 1999), *cert. denied*, 2000 U.S. Lexis 4002 (June 12, 2000), does mention that the suit involved a "class-wide challenge[] to INS practices," its description of the case as one that did not claim that the INS should have granted relief on the merits to any particular alien but instead "assert[ed] 'a program, pattern or scheme by immigration officials to violate the constitutional rights of aliens'" is equally accurate with respect to Petitioners' procedural due process claims in this case. *Id.* at 1297. Although Petitioners' suit was not filed as a class action, it challenges the INS's general policies and procedures in dealing with requests for stays of deportation, voluntary departure, and humanitarian parole, rather than the substance of the decision rendered in Petitioners' particular case.

Finally, Respondents' various efforts to distinguish the Fourth and Sixth Circuit opinions cited in the Petition are equally unavailing. Just as in *Mustata v. U.S. Dep't of Justice*, 179 F.3d 1017 (CA6 1999), where the court refused to apply § 1252(g) to bar the plaintiffs' claim that their attorney's ineffective assistance in presenting their asylum request denied them due process, a finding that Petitioners are challenging the Attorney General's decision to "execute [a] removal order" within the terms of § 1252(g) "confuses the substance of [their] claim with the remedy requested." *Id.* at 1023. Petitioners "are not claiming that the Attorney General should grant them discretionary, deferred-action-type relief" on the merits, but are simply challenging the constitutionality of the procedures used in acting on requests for stays of deportation, voluntary departure, and humanitarian parole. *Id.* at 1022. Like the plaintiff in *Selgeka v. Carroll*, 184 F.3d 337 (CA4 1999), Petitioners are challenging deficiencies in the procedures used by the INS and not "the Attorney General's authority to adjudicate cases," *id.* at 342; as in *Selgeka*, they do "not contest that 'the Attorney General, through its designee, the BIA, [would] eventually adjudicate [their] case.'" Brief in Opposition at 13 (quoting *Selgeka*, 184 F.3d at 342). Under the court's reasoning in *Zhislin v. Reno*, 195 F.3d 810 (CA6 1999), Petitioners' claims would not be jurisdictionally barred "even though they arise from deportation proceedings" because they involve "no challenge ... to the Justice Department's discretion to prosecute." *Id.* at 813, 814. And finally, this case is similar to *Stewart v. INS*, 181 F.3d 587 (CA4 1999), where the court refused to apply § 1252(g) to bar claims filed by an alien who was denied asylum and who then wanted to challenge the BIA's denial of her motion to reopen the deportation proceedings – not on

the merits, but because she had stayed in this country beyond her voluntary departure date.[5]

Respondents rely on another Fourth Circuit decision, *Mapoy v. Carroll*, 185 F.3d 224 (CA4 1999), *cert. denied*, 120 S. Ct. 1417 (2000), to support their contention that the opinion below is consistent with rulings issued by other courts. Brief in Opposition at 10-11. But there is no indication in the Fourth Circuit's opinion that Mapoy's challenge to the BIA's denial of a stay of deportation was anything other than a challenge to the merits of that decision, as opposed to the procedures used in reaching that decision. Thus, there is no indication that the Fourth Circuit has retreated from the position it took in *Selgeka* and *Stewart*, which are not even cited in *Mapoy*.[6]

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[5] The Brief in Opposition mentions several times that Petitioners failed to seek an extension of Mr. Botezatu's voluntary departure date. Brief in Opposition at 3-4. But Petitioners' complaint alleged that "[t]he Chicago District Office of the INS does not have a consistent policy on extending or reinstating voluntary departure during a Seventh Circuit appeal of an asylum case," Pet. App. at 46-47, and if they had been allowed to pursue their claims and conduct discovery, Petitioners would have sought to demonstrate that the Chicago District Office took the position that it had no jurisdiction to extend voluntary departure dates while a Seventh Circuit appeal was pending.

[6] In arguing that there is no conflict among the courts of appeals on this issue, the Brief in Opposition does not even acknowledge the Third Circuit's position that § 1252(g)'s jurisdictional bar is limited to "suits challenging the government's selective enforcement of the immigration laws." *DeSousa v. Reno*, 190 F.3d 175, 182 (CA3 1999).

Because the decision below misinterprets this Court's ruling in *AADC* and conflicts with the rulings of a number of other courts of appeals, Petitioners respectfully request that the Court grant certiorari.

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